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SUPREME COURT, U.S.
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No.

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Sheila M. Hobson was the charging party before the Board and an intervenor in the court of appeals.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 808 F.3d 1013. The decision and order of the National Labor Relations Board (App., *infra*, 17a-212a) are reported at 361 N.L.R.B. No. 72.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 215a-220a) was entered on February 18, 2016. A petition for rehearing was denied on May 13, 2016 (App., *infra*, 213a-214a). On August 10, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 221a-224a.

STATEMENT

1. a. In the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress has articulated "the policy of the United States" of encouraging collective bargaining and "protect[ing] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. 151. The NLRA expressly provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

In 29 U.S.C. 158(a)(1), the NLRA provides in turn that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has committed an unfair labor practice. The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

2. a. Murphy Oil USA, Inc. (respondent) operates more than 1000 gas stations in 21 States. See App., *infra*, 24a. It required each of its employees and job applicants to sign, as a condition of employment, a "Binding Arbitration Agreement and Waiver of Jury Trial" (Agreement), which provided, as relevant here, as follows:

> Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment * * * by binding arbitration. * * *
>
> * * * *
>
> By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

Id. at 24a-26a (brackets in original).

In November 2008, Sheila Hobson signed the Agreement when she applied for employment with respondent. App., *infra*, 26a. She worked at respondent's Calera, Alabama, facility from then until September 2010. *Ibid.*

b. In June 2010, Hobson and three other employees filed a collective action against respondent in the United States District Court for the Northern District of Alabama, alleging violations of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* App., *infra*, 26a-27a; see 29 U.S.C. 216(b); *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 169-173 (1989) (describing Section 216(b) collective actions). Respondent, invoking the Agreement, moved to dismiss the collective action and compel individual arbitration of the employees' FLSA claims. *Id.* at 27a. The district court granted the motion over the employees' opposition. *Id.* at 28a.

Hobson filed an unfair-labor-practice charge with the Board. App., *infra*, 27a. In March 2011, on the basis of Hobson's charge, the Board's Acting General Counsel issued an administrative complaint alleging that respondent's maintenance of the Agreement interfered with its employees' right under 29 U.S.C. 157 to engage in concerted legal activity and thus constituted an unfair labor practice in violation of Section 158(a)(1). App., *infra*, 27a.

c. In January 2012—while the proceeding against respondent was still pending before the Board—the Board decided in a separate case that agreements with individual employees that require them to use individual arbitration for all work-related disputes with their employer interfere with their Section 157 right to

engage in concerted activities, in violation of Section 158(a)(1). *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-2283 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013). The Board's decision in *D.R. Horton* recognized that the FAA "generally makes employment-related arbitration agreements judicially enforceable," but the Board held that when such an agreement violates the NLRA, the FAA does not require its enforcement. *Id.* at 2277, 2283-2288. The Board explained that this Court has long recognized that individual contracts that restrict rights under Section 157 are unlawful and that illegality under the NLRA is a defense to contract enforcement. *Id.* at 2287 (discussing *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-84 (1982)). The Board added that applying that principle to arbitration agreements does not conflict with the FAA because doing so does not treat arbitration agreements any "worse than any other private contract that conflicts with Federal labor law." *Id.* at 2285. Accordingly, the Board concluded that its unfair-labor-practice finding did not run afoul of this Court's invalidation under the FAA of contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)).

On review, the Fifth Circuit rejected the Board's analysis in *D.R. Horton*, holding that the NLRA does not "override" the FAA and that the "use of class action procedures * * * is not a substantive right" under Section 157. *D.R. Horton, Inc.* v. *NLRB*, 737

F.3d 344, 357, 360-362 (2013).[1] The court recognized that prior decisions by the Board and by courts "give some support to the Board's analysis that collective and class claims * * * are protected by Section [157]." *Id.* at 357. Nevertheless, the court found that "[a] detailed analysis of [*AT&T Mobility*] leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359. In the court's view, even though the Board's interpretation is "facially neutral" about arbitration—by prohibiting concerted-action waivers in the context of both arbitral and non-arbitral forums—its effect is still "to disfavor arbitration," because employees' ability to "seek class relief in court" would discourage employers "from using individual arbitration." *Ibid.* The court further determined that the NLRA does not "contain[] a congressional command to override the FAA." *Id.* at 360.

Judge Graves dissented in relevant part, explaining that he agreed with the Board's reasoning. See *D.R. Horton*, 737 F.3d at 364-365. He noted that the Board's finding of illegality under the NLRA does not conflict with the FAA because it satisfies the saving clause in Section 2 and treats the agreement "no worse than any other private contract that conflicts with Federal labor law." *Id.* at 365 (quoting *D.R. Horton*, 357 N.L.R.B. at 2285).

The Board sought rehearing en banc in *D.R. Horton*, but its petition was denied in April 2014. App., *infra*, 5a.

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[1] The Fifth Circuit's decision in *D.R. Horton* agreed with the Board that an arbitration agreement does constitute an unfair labor practice to the extent that it can be reasonably construed by employees as prohibiting them from filing unfair-labor-practice charges with the Board. 737 F.3d at 364.

d. In October 2014, the Board issued its decision in the proceeding against respondent. App., *infra*, 17a-212a. Notwithstanding the Fifth Circuit's contrary intervening decision, the Board reaffirmed its own decision in *D.R. Horton*, concluding that "[i]ts reasoning and its result were correct" and that "no decision of th[is] Court speaks directly to the issue." *Id.* at 22a-23a.

The Board explained that the Section 157 "right to engage in collective action—including collective *legal* action—is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." App., *infra*, 40a (quoting and adding second emphasis to *D.R. Horton*, 357 N.L.R.B. at 2286). The Board concluded that an agreement that "prevents employees from exercising their Section [157] right to pursue legal claims concertedly—by, as here, precluding them from filing joint, class, or collective claims addressing their working conditions in *any* forum, arbitral or judicial—* * * amounts to a prospective waiver of a right guaranteed by the NLRA" and therefore a violation of Section 158(a)(1). *Id.* at 43a. As a result, the Board further concluded, the FAA does not require enforcement of such an agreement. The Board explained, among other things, that the saving clause in 9 U.S.C. 2 makes an exception for "such grounds as exist at law or in equity for the revocation of any contract" and that illegality under the NLRA is an established defense to the enforcement of any contract. App., *infra*, 44a (quoting 9 U.S.C. 2).[2]

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[2] The individual arbitration agreements in *D.R. Horton* and in this case were conditions of employment and therefore did not require the Board to decide the legality of an employee's purely

Accordingly, the Board found that respondent committed an unfair labor practice by "requiring its employees to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements" in the FLSA collective action filed by Hobson and her co-employees. App., *infra*, 23a; see *id.* at 74a-84a.

e. Two members of the Board dissented in relevant part. App., *infra*, 89a-131a, 131a-208a.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit, which it was entitled to do because it "transacts business" there. 29 U.S.C. 160(f); see App., *infra*, 1a. In light of that court's prior decision in *D.R. Horton*, the Board moved at the outset to have the case heard en banc, but its motion was denied. *Id.* at 1a-2a. The court adhered to its precedent in *D.R. Horton*, holding that the Agreement is enforceable and not unlawful to the extent that it requires employees to pursue all employment-related claims through individual arbitration and not through class or collective actions. *Id.* at 2a, 8a.[3]

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voluntary agreement to resolve all potential employment disputes through individual arbitration. See *D.R. Horton*, 357 N.L.R.B. at 2289 n.28 (reserving the issue); App., *infra*, 20a, 28a, 84a-85a (articulating rule in the context of a condition of employment and finding that respondent's Agreement was such a condition). The Board has since concluded that individual arbitration agreements prospectively waiving Section 157 rights are unlawful regardless of whether they are entered into voluntarily. See *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, 2015 WL 5113231, at *9 (Aug. 27, 2015), enforcement denied, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) (summary disposition).

[3] The court of appeals also reversed the Board's finding that respondent had violated Section 158(a)(1) by seeking to enforce the

4. The Board filed a petition for rehearing en banc, which was denied on May 13, 2016. App., *infra*, 213a-214a.

REASONS FOR GRANTING THE PETITION

This case concerns an important and recurring question about the scope of employees' rights under the NLRA: whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes, thereby prospectively waiving the employees' right to engage in collective legal action in any forum, whether arbitral or judicial. The Board, which is charged with enforcing the NLRA, has reasonably concluded that such agreements are unlawful under that Act, because they would deprive employees of their statutory right to engage in "concerted activities" in pursuit of their "mutual aid or protection." 29 U.S.C. 157. The court of appeals erred in concluding that contracts that are unlawful under the NLRA must nevertheless be enforced pursuant to the FAA. To the contrary, the saving clause in 9 U.S.C. 2 does not require enforcement when a contract is unlawful for such reasons (*i.e.*, reasons that are not limited to the context of arbitration agreements).

Agreement through its motion to dismiss the district-court FLSA action and to compel arbitration of Hobson's FLSA claim. App., *infra*, 12a-17a. In addition, as in *D.R. Horton* (see note 1, *supra*), the court held that the Agreement is unenforceable to the extent that it could reasonably be construed as prohibiting employees from filing unfair-labor-practice charges with the Board. App., *infra*, 10a-11a. The court found that the pre-March-2012 version of the Agreement signed by Hobson does violate the NLRA to that extent, and it enforced the Board's order that respondent take corrective action as to any employees that remain subject to that version of the Agreement. *Id.* at 11a, 217a-220a.

Since the court of appeals' denial of rehearing en banc in this case, two other circuits have agreed with the Board's reasoning and expressly disagreed with the reasoning and result of the decision below, and two circuits have reaffirmed prior decisions rejecting the Board's position. There is accordingly a square circuit conflict on the question presented. Moreover, the issue affects countless employees and employers nationwide. This Court's review is therefore warranted.

A. Agreements Waiving Employees' Ability To Pursue Work-Related Claims On A Class Or Collective Basis In Any Forum Interfere With The Employees' Right To Engage In "Other Concerted Activities" Under 29 U.S.C. 157 And Are Therefore Not Enforceable In Light Of The Saving Clause In 9 U.S.C. 2

1. The NLRA expressly provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*," and "to refrain from any or all of such activities." 29 U.S.C. 157 (emphases added). As this Court has explained, that right extends beyond collective bargaining and includes employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). Section 157's protection has therefore been seen as including the right to engage in the collective pursuit of work-related legal claims. See, *e.g.*, *Brady* v. *National Football League*, 644 F.3d 661, 673 (8th

Cir. 2011) (observing that "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section 157]").

The Board's conclusion that individual employees may not prospectively waive their right under Section 157 to join with others in pursuing work-related legal claims is soundly anchored in decisions of this Court establishing that even voluntary agreements with individual employees are unlawful if they impede their right to engage in future concerted activity. For instance, in *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), the Court held that agreements between employers and individual employees in which the employees prospectively waive their right to present grievances to the employer "in any way except personally" are unenforceable and "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361, 364. Subsequently, in *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), the Court held that individual contracts that employees had freely entered into with their employer could not be used to "forestall bargaining or to limit or condition the terms of the collective agreement" if the employees thereafter exercised their Section 157 right to choose a union to negotiate a collective-bargaining agreement on their behalf. *Id.* at 337.[4]

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[4] Collective waivers of some rights, negotiated on employees' behalf by their exclusive bargaining representative, are distinguishable. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280-283 (1956). The Board has recognized that such waivers are themselves the product of concerted activity—the choice of employees to exercise their

In light of such decisions, prospective waivers like respondent's Agreement—waivers that seek to excise specific forms of concerted activity from Section 157—directly contravene the NLRA. Accordingly, the Board reasonably found that respondent committed an unfair labor practice in violation of 29 U.S.C. 158(a)(1) by maintaining its Agreement purporting to bar Hobson and other employees from exercising their Section 157 right to engage in concerted action in pursuing the resolution of work-related legal disputes.

2. The court of appeals did not take issue with the Board's expert interpretation of Section 157, which is entitled to "considerable deference." *NLRB* v. *City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984); see *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *5 & n.5 (9th Cir. Aug. 22, 2016) (finding "the Board's interpretation" of Sections 157 and 158 to bar such agreements "is correct"; noting in the alternative that if the statute were ambiguous, the Board's construction would be entitled to deference), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016) (same), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). It nevertheless held that pro-arbitration policies underlying the FAA prevent the Board from giving effect to its finding that concerted-action waivers constitute a prohibited unfair labor practice. In the court of appeals' view, the NLRA cannot justify a departure from "the requirement under the FAA that arbitration agreements must

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Section 157 right "to bargain collectively through representatives of their own choosing." 29 U.S.C. 157; see *D.R. Horton*, 357 N.L.R.B. at 2286; see also *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257-260 (2009).

be enforced according to their terms." *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 358 (5th Cir. 2013). That view, however, fails to heed the principle that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see also *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236-2239 (2014).

Here, co-existence is prescribed by the FAA itself, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2 (emphasis added). Read together, that enforcement mandate and the limitation in the saving clause reflect the FAA's purpose of placing arbitration agreements "on equal footing with all other contracts." *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468, 471 (2015) (quoting *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006)).

This Court has explained that the "saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses * * *, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation and internal quotation marks omitted). The illegality under the NLRA of a concerted-action waiver by an individual employee falls within the saving clause because it applies to arbitral and judicial forums alike and because it does not derive its meaning from the fact that an agreement to arbitrate is at issue. "The problem with the contract * * * is not that it requires arbitra-

tion; it is that the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims." *Morris*, 2016 WL 4433080, at *6. In such circumstances, if the Board's finding of a prohibited unfair labor practice under "the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says." *Lewis*, 823 F.3d at 1159.[5]

3. That straightforward application of the saving clause is not, as the court of appeals believed, foreclosed by this Court's decisions sustaining arbitration agreements against other kinds of challenges. This Court has never found enforceable an arbitration agreement that violates a federal statute as respondent's Agreement violates the NLRA.

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[5] For that reason, although the Board disagrees with the Fifth Circuit's analysis of the relevant statutory provisions and policies, it is unnecessary to reach the question of whether the NLRA contains a "contrary congressional command" overriding the FAA. See *D.R. Horton*, 737 F.3d at 360-361. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, in light of the saving clause, there is no conflict between the statutes; both can, and should, be given effect. *Morton*, 417 U.S. at 551; accord *Morris*, 2016 WL 4433080, at *7 ("[T]he FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield."); *Lewis*, 823 F.3d at 1157 ("[T]here is no conflict between the NLRA and the FAA, let alone an irreconcilable one.").

Even assuming there were a conflict, the result would be the same. It is evident that Section 158(a)(1) expressly commands employers not to interfere with their employees' Section 157 right to engage in concerted activity for mutual aid or protection. To the extent an arbitration agreement bars concerted pursuit of claims in any forum, whether arbitral or judicial, its enforcement under the FAA would inherently conflict with the NLRA.

The Court has enforced arbitration agreements over challenges based on provisions in other federal statutes only where such agreements were not in conflict with the animating purposes of those statutes. For example, in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which involved a manager's challenge to arbitration of his discriminatory-discharge claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, the Court determined that Congress's purpose in enacting the ADEA was "to prohibit arbitrary age discrimination in employment." 500 U.S. at 27 (internal quotation marks omitted). Because the substantive rights of individual employees to be free from age-based discrimination could be adequately vindicated in individual arbitration, the Court held that the arbitration agreement could be enforced. *Id.* at 27-29. The Court rejected arguments that ADEA provisions affording a judicial forum and an optional collective-action procedure precluded enforcement of the arbitration agreement, explaining that Congress did not "intend[] the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum." *Id.* at 29, 32 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (second alteration in original)).[6]

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[6] This Court has maintained that same analytical focus on central statutory purposes when assessing challenges to the enforcement of arbitration agreements based on provisions in other federal statutes. See, *e.g.*, *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 670-671 (2012) (judicial-forum provision not "principal substantive provision[]" of Credit Repair Organizations Act); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Shearson/Am. Ex-*

The NLRA is unlike the statutes at issue in FAA cases such as *Gilmer*, which do not have a core objective of protecting collective action and a concomitant bar to individual employees' waiver of that right. By contrast, the NLRA's core provision provides a *collective* right to band together for "mutual aid or protection" in efforts to improve working conditions, 29 U.S.C. 157, which makes the NLRA "unique among workplace statutes," App., *infra*, 18a. Thus, the ability to engage in concerted activities under the NLRA is not a mere procedural means for vindicating some other statutory right. It is, as the Board has concluded, "the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Id.* at 40a (quoting and adding second emphasis to *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2286 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013)); see *Morris*, 2016 WL 4433080, at *8 (describing "[t]he rights established in [Section 157]" as "substantive" and "the central, fundamental protections of the [NLRA]"); *Lewis*, 823 F.3d at 1160 (describing Section 157 as "the NLRA's *only* substantive provision," which "[e]very other provision of the statute serves to enforce"). Congress expressly protected that right from employer interference in 29 U.S.C. 158(a)(1). Therefore, arbitration agreements with individual employees covered by the NLRA that preclude them from engaging in concerted legal action are analogous to contracts providing that employees can be fired on the basis of age contrary to the ADEA or will not be paid the minimum wage dictated by the

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press Inc. v. *McMahon*, 482 U.S. 220, 235-236 (1987) (Exchange Act provision not intended to bar arbitration when "chief aim" was to preserve exchanges' self-regulatory role).

FLSA. This Court has never held that arbitration agreements may waive such substantive rights or be given effect in contravention of the statutes that create and protect those rights.

Nor was the court of appeals correct in concluding that the FAA's saving clause disallows the defense of illegality under the NLRA in light of "[a] detailed analysis of" this Court's decision in *AT&T Mobility*. *D.R. Horton*, 737 F.3d at 359. As described above, the Board's rule fits within the saving clause because it bars enforcement of agreements with individual employees to the extent that they violate a co-equal federal statute in a manner that would invalidate any contract. By contrast, in *AT&T Mobility*, a consumer asserted that an arbitration agreement was unenforceable under a judicial interpretation of California's state unconscionability principles that barred class-action waivers in most arbitration agreements. 563 U.S. at 340. The Court declined to read the saving clause as protecting that state policy of facilitating low-value claims brought under other laws, which "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 340, 343; see also *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310, 2312 & n.5 (2013).[7] That holding does not sug-

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[7] In *Italian Colors*, this Court invoked *AT&T Mobility* in overturning a federal-court-imposed requirement that collective litigation must be available when individual arbitration would impose "prohibitive costs" on pursuing claims under the antitrust laws. 133 S. Ct. at 2308. The Court held that the antitrust laws do not guarantee an "affordable procedural path" for bringing such claims, *id.* at 2309, and that effective vindication of such claims does not require that the costs make the effort in a particular case worthwhile, *id.* at 2310-2312.

gest that the FAA mandates enforcement of a contract that directly violates the NLRA.

In rejecting the Board's position, the Fifth Circuit relied principally on *AT&T Mobility*'s analysis of the California rule's disincentives to individual arbitration. *D.R. Horton*, 737 F.3d at 359. But it failed to recognize, as the Seventh Circuit has, that "[n]either [*AT&T Mobility*] nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA." *Lewis*, 823 F.3d at 1158. Moreover, those cases analyzed whether judge-made or implicit statutory policies were incompatible with the FAA; in this case, the analysis entails "reconciling two federal statutes, which must be treated on equal footing." *Ibid.*

Far from being hostile to the principle that arbitration is an effective means of enforcing employees' statutory rights, the Board recognizes that arbitration is "a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process." *D.R. Horton*, 357 N.L.R.B. at 2289; see, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 256 (2009). Unlike the rule invalidated in *AT&T Mobility*—under which California courts were "more likely" to invalidate "contracts to arbitrate * * * than other contracts," 563 U.S. at 342—the Board's application of Sections 157 and 158(a)(1) does not disfavor arbitration. Instead, it applies "[i]rrespective of the forum in which disputes are to be resolved," simply requiring that "[a]rbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims," *Morris*, 2016 WL 4433080, at *10, even those presented in judicial forums where collective or class actions are

expressly permitted. Nor has the Board required class procedures in arbitration, as did the California rule invalidated in *AT&T Mobility*. Rather, the Board acknowledges an employer's right "to insist that *arbitral* proceedings be conducted on an individual basis," so long as employees remain free to bring concerted actions in court. *D.R. Horton*, 357 N.L.R.B. at 2288; see *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party has *agreed* to do so.").

The court of appeals erred in concluding that the Board's application of Sections 157 and 158(a)(1) is precluded by the FAA.

B. There Is An Acknowledged And Growing Conflict In The Circuits Concerning The Invalidity Of Arbitration Agreements That Would Preclude Employees From Pursuing Class Or Collective Actions In Any Forum

In both *D.R. Horton* and the decision below, the Fifth Circuit noted that its holding accords with other courts of appeals' "express[] state[ments]" about the question presented. App., *infra*, 8a n.3 (citing, *inter alia*, *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013), and *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013)); *D.R. Horton*, 737 F.3d at 362 (same).[8] Two state courts of last resort

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[8] The decision below also noted that other federal courts of appeals had "indicated" their agreement in decisions that are not directly on point. App., *infra*, 8a n.3 (citing *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir.), cert. denied, 134 S. Ct. 2886 (2014); *Richards* v. *Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014)). In *Walthour*, the Eleventh Circuit addressed whether the

have also expressed agreement with those cases. See *Tallman* v. *Eighth Judicial Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015); *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 133, 141-143 (Cal. 2014) (agreeing with the Fifth Circuit with respect to the enforceability of a waiver of the right to proceed on a "class action" or "representative" basis, but noting that the waiver at issue was narrower than the one in *D.R. Horton*, since it permitted joint and consolidated claims before the arbitrator; declining to "decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section [157]"), cert. denied, 135 S. Ct. 1155 (2015).

There is, however, no longer unanimity. In the four months since the court of appeals denied the Board's petition for rehearing en banc in this case, four other circuits have addressed the validity, in light of the NLRA, of arbitration agreements that prohibit employees from pursuing work-related claims on a collective basis in any forum. Two of those courts expressly disagreed with the Fifth Circuit and agreed with the Board's position.

1. In *Lewis*, *supra*, the Seventh Circuit held that an employment agreement materially similar to the one at issue in this case (*i.e.*, one requiring any wage-and-hour claims against the employer to be brought only through individual arbitration) violates the NLRA and

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FLSA precludes a collective-action waiver, but it did not address the NLRA. See 745 F.3d at 1334-1336. In *Richards*, the Ninth Circuit found that the employees had waived any argument based on the Board's decision in *D.R. Horton*. See 744 F.3d at 1075 & n.3. The Ninth Circuit's more recent decision in *Morris* has squarely addressed the question and rejected the Fifth Circuit's position. See p. 22, *infra*.

is not enforceable in light of the FAA's saving clause. 823 F.3d at 1151. After describing decisions by the Board and by courts construing Section 157, the court concluded that the "text, history, and purpose" of that provision all show that it "should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 1152-1153. Although the court concluded that the statute unambiguously supports the Board's construction, the court further noted that, even if Section 157 were ambiguous, it would be bound to defer to the Board's reasonable determination that the NLRA "prohibit[s] employers from making agreements with individual employees barring access to class or collective remedies." *Id.* at 1153. As a result, the court held that an arbitration provision purporting to prohibit employees from pursuing a collective action under the FLSA violates the NLRA. *Id.* at 1156.

The Seventh Circuit in *Lewis* also rejected the employer's contention that the FAA nevertheless requires such an arbitration agreement to be enforced. 823 F.3d at 1156-1161. The court reasoned that, because the concerted-action waiver is prohibited by the NLRA, it falls squarely within the saving clause in 9 U.S.C. 2, and is therefore unenforceable under the FAA's own terms. 823 F.3d at 1157-1160.

The Seventh Circuit recognized that the Fifth Circuit had reached "the opposite conclusion" in *D.R. Horton*, but the *Lewis* court found "several problems with" the Fifth Circuit's "logic." 823 F.3d at 1157-1158. It acknowledged that its decision "would create a conflict in the circuits," but noted that no Seventh Circuit judge "wished to hear the case en banc." *Id.* at 1157 n.†.

The unsuccessful employer in *Lewis* did not seek rehearing in the court of appeals and has instead filed a petition for a writ of certiorari from this Court. See *Epic Sys. Corp.* v. *Lewis*, No. 16-285 (filed Sept. 2, 2016). There is accordingly little reason to expect the Seventh Circuit's express disagreement with the Fifth Circuit to be resolved without this Court's intervention.[9]

2. Moreover, that circuit split has grown, as the Ninth Circuit recently held that an arbitration agreement that precludes employees "from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment" constitutes a violation of the NLRA and is therefore unenforceable. *Morris*, 2016 WL 4433080, at *1. Like the Seventh Circuit, the Ninth Circuit concluded that the Board has correctly construed Sections 157 and 158 in finding that concerted-action waivers violate the NLRA, *id.* at *2-*5, and, further, that the FAA "does not dictate a contrary result" because, in light of the NLRA, "the saving clause of the FAA prevents the enforcement of that waiver," *id.* at *6, *8. The court in *Morris* recognized that its "sister Circuits are divided on this question," but it expressly "agree[d] with the Seventh Circuit." *Id.* at *10 n.16. Judge Ikuta dissented, expressing the view that the majority had "join[ed] the wrong side of a circuit split." *Id.* at *11.

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[9] The Board filed an amicus brief in the court of appeals in *Lewis*, but is not a party to that proceeding. This case—in which the Board is a party and is able to defend more directly its construction of Sections 157 and 158—would therefore be a better vehicle than *Lewis* for this Court's review of whether collective-action waivers are unenforceable in light of the FAA's saving clause because they are prohibited by the NLRA.

The unsuccessful employer in *Morris* has not pursued rehearing en banc and has instead filed a petition for a writ of certiorari from this Court. See *Ernst & Young, LLP* v. *Morris*, No. 16-300 (filed Sept. 8, 2016).[10]

3. The third court of appeals to have addressed the issue in the last several months is the Eighth Circuit. In *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772 (8th Cir. 2016), that court reaffirmed, without analysis, its prior conclusion that an employer does not commit an unfair labor practice when it "requir[es] its employees to enter into an arbitration agreement that includes a waiver of class or collective actions in all forums to resolve employment-related disputes." *Id.* at 776 (citing *Owen*, 702 F.3d at 1053-1055).

4. Most recently, the Second Circuit also reaffirmed a previous decision that had declined to follow the Board's *D.R. Horton* approach. In a summary order in *Patterson* v. *Raymours Furniture Co.*, No. 15-2820 (2d Cir. Sept. 7, 2016) (Doc. 154, corrected summary order), the court noted that "[t]he circuit courts * * * are irreconcilably split on the question." *Id.* at 5. The court acknowledged that, "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that [a] waiver of collective action is unenforceable." *Id.* at 6. But the court concluded it was bound by "a

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[10] As in *Lewis*, the Board was not a party to the proceeding in the court of appeals in *Morris*, but instead participated only as an amicus curiae, which again means that this case would be a better vehicle for this Court's consideration of the question presented. See note 9, *supra*.

brief footnote" in its earlier decision in *Sutherland*, which had "rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*." *Id.* at 6-7 (discussing *Sutherland*, 726 F.3d at 297 n.8).

5. The existing conflict may continue to grow in the near future. Apart from the recent decisions of the Second, Fifth, Seventh, Eighth, and Ninth Circuits, cases that raise the issue are pending in five additional circuits.[11]

C. The Enforceability Of Individual Concerted-Action Waivers Is A Question Of Exceptional Importance

The validity of agreements that waive workers' right under the NLRA to proceed on a class or collective basis is a question of exceptional importance that warrants this Court's review. The agency charged with implementing and enforcing the NLRA has concluded that such agreements threaten that important Act's "core objective": "the protection of workers' ability to act in concert, in support of one another." App., *infra*, 17a. Moreover, resolving the question presented will have a direct and immediate effect on countless employees and employers throughout the Nation, because individual-arbitration agreements have become so widespread.[12]

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[11] See, *e.g.*, *The Rose Group* v. *NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.); *AT&T Mobility Servs., LLC* v. *NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB* v. *Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc.* v. *NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc.* v. *NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

[12] See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) ("Employment arbitration grew dramatically in the wake of * * * *Gilmer*" and "estimates suggest that for

Until this Court speaks to the question, many of those employees will be unable to predict whether the concerted-action waivers in their arbitration agreements will be enforceable in any particular instance. As illustrated by the facts of this case, employers may seek to have decisions of the Board reviewed in any circuit in which they transact business, without regard to where the underlying disputes arose. See 29 U.S.C. 160(f); App., *infra*, 8a-9a. As a result, even those employees who work outside the Second, Fifth, and Eighth Circuits may find themselves unable to seek the Board's assistance in vindicating the rights under the NLRA that the Board has recognized.

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perhaps a third or more of nonunion employees, arbitration, not litigation, is the primary mechanism of access to justice in the employment law realm."); Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 893 (2016) ("In 2008, it was estimated that about fifteen percent to twenty-five percent of employers nationally had adopted mandatory arbitration procedures.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2016

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* The Acting Solicitor General is recused in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

Oct. 26, 2015

On Petitions for Review of an Order of the
National Labor Relations Board

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in

that motion and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The Arbitration Agreement provides that, "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Murphy Oil moved to dismiss the

collective action and compel individual arbitration pursuant to the Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act ("NLRA") to engage in Section 7 protected concerted activity.

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D.R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1). *Id.* at *2, *18.

Following the Board's decision in *D.R. Horton*, Murphy Oil implemented a "Revised Arbitration Agreement" for all employees hired after March 2012. The

revision provided that employees were not barred from "participating in proceedings to adjudicate unfair labor practice[] charges before the" Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement.[1] One month later, the General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). We held: (1) the NLRA does not contain a "congressional command overriding"

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[1] The employees never submitted their claims to arbitration. In February 2015, the employees moved for reconsideration of the Alabama district court's order compelling arbitration. The district court denied their motion and ordered the employees to show cause why their case should not be dismissed with prejudice for failing to adhere to the court's order compelling arbitration. The district court ultimately dismissed the case with prejudice for "willful disregard" of its instructions in order to "gain [a] strategic advantage." *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *3 (N.D. Ala. July 8, 2015), *appeal docketed*, No. 15-13507 (11th Cir. Aug. 5, 2015). The employees timely appealed. The case is pending before the Eleventh Circuit.

the Federal Arbitration Act ("FAA");[2] and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-62. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration. *Id.* at 362.

In analyzing the specific arbitration agreement at issue in *D.R. Horton*, however, we held that its language could be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). *Id.* at 364. We enforced the Board's order requiring the employer to clarify the agreement. *Id.* The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court." The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

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[2] 9 U.S.C. § 1 *et seq.*

The Board ordered numerous remedies. Murphy Oil was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees' attorneys' fees incurred in opposing the company's motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are "reasonable and supported by substantial evidence on the record considered as a whole" are upheld. *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007) (citation and quotation marks omitted); *see also* 29 U.S.C. § 160(e). "Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion." *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003) (citation and quotation marks omitted). This court reviews the Board's legal conclusions *de novo*, but "[w]e will enforce the Board's order if its construction of the statute is reasonably defensible." *Strand Theatre*, 493 F.3d at 518 (citation and quotation marks omitted).

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that Hobson filed her charge too late after the execution of the Arbitration Agreement and the submission of Murphy Oil's motion to compel in the Alabama litigation. By statute, "no com-

plaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Murphy Oil also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in Murphy Oil's answer to the Board's complaint. They were not, though, discussed in its brief before the Board. "No objection that has not been urged before the Board . . . shall be considered by the court. . . ." 29 U.S.C. § 160(e), (f). Similarly, we have held that "[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions." *NLRB v. Catalytic Indus. Maint. Co. (CIMCO)*, 964 F.2d 513, 521 (5th Cir. 1992). While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived. *See* 29 U.S.C. § 160(e), (f).

II. D.R. Horton *and Board Nonacquiescence*

The Board, reaffirming its *D.R. Horton* analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that "requir[ed] . . . employees to agree to resolve all employment-related claims through individual arbitration." In doing so, of course, the Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not unlawful. *D.R. Horton*, 737

F.3d at 362.[3] Our decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here. *See id.*

Murphy Oil argues that the Board's explicit "defiance" of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to "restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt's directive." The Board, as far as we know, has not failed to apply our ruling in *D.R. Horton* to the parties in that case. The concern here is the application of *D.R. Horton* to new parties and agreements.

An administrative agency's need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-43 (1989). Murphy Oil could have sought review in (1) the circuit where the unfair labor

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[3] Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer's maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA. *See Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied*, — U.S. —, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied*, — U.S. —, 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). The Board may well not know which circuit's law will be applied on a petition for review. We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence.

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil's enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. 29 U.S.C. § 158(a). For example, an employer is prohibited from interfering with employees' exercise of their Section 7 rights. *Id.* § 158(a)(1). Under Section 7, employees have the right to self-organize and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. *See id.*

§ 160(a). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 64 S. Ct. 576, 88 L. Ed. 762 (1944). Accordingly, as we held in *D.R. Horton*, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board. 737 F.3d at 363.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question. "[T]he actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *See Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014). The Board has said that the test is whether the employer action is "likely to have a chilling effect" on employees' exercise of their rights. *Id.* (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998)). The possibility that employees will misunderstand their rights was a reason we upheld the Board's rejection of a similar provision of the arbitration agreement in *D.R. Horton*. We explained that the FAA and NLRA have "equal importance in our review" of employment arbitration contracts. *D.R. Horton*, 737 F.3d. at 357. We held that even though requiring arbitration of class or collective claims in all forums does not "deny a party any statutory right," an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA. *Id.* at 357-58, 363-64.

Murphy Oil's Arbitration Agreement provided that "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" must be resolved by individual arbitration. Signatories further "waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum." The problem is that broad "any claims" language can create "[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well." *D.R. Horton*, 737 F.3d at 363-64 (citing *Bill's Electric, Inc.*, 350 N.L.R.B. 292, 295-96 (2007)).

We do not hold that an express statement must be made that an employee's right to file Board charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract. *See id.* at 364.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in *D.R. Horton*, Murphy Oil added the following clause in the Revised Arbitration Agreement: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." The Board con-

tends that Murphy Oil's modification is also unlawful because it "leaves intact the entirety of the original Agreement" including employees' waiver of their right "to commence or be a party to any group, class or collective action claim in . . . any other forum." This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy "since such a claim could be construed as having 'commence[d]' a class action in the event that the [Board] decides to seek classwide relief."

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor practices. 29 U.S.C. § 158(a). Section 8(a)(1) provides that an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights, including engaging in protected concerted activity. *Id.* §§ 157, 158(a)(1).

The Board said that in filing its dispositive motion and "eight separate court pleadings and related [documents] . . . between September 2010 and Febru-

ary 2012," Murphy Oil "acted with an illegal objective [in]. . . . 'seeking to enforce an unlawful contract provision'" that would chill employees' Section 7 rights, and awarded attorneys' fees and expenses incurred in "opposing the . . . unlawful motion." We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). That decision discussed the balance between an employer's First Amendment right to litigate and an employee's Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. *Id.* at 733, 103 S. Ct. 2161. After the Board's General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. *Id.* at 734, 103 S. Ct. 2161. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees' engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA. *Id.* at 734-35, 103 S. Ct. 2161.

The Board held that the restaurant's lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. *Id.* at 735-37, 103 S. Ct.

2161. The Supreme Court remanded the case for further consideration, stating: "The right to litigate is an important one," but it can be "used by an employer as a powerful instrument of coercion or retaliation." *Id.* at 740, 744, 103 S. Ct. 2161. To be enjoinable, the Court said the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law." *Id.* at 737 n.5, 744, 748, 103 S. Ct. 2161.

We start by distinguishing this dispute from that in *Bill Johnson's*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson's may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Moreover, the timing of Murphy Oil's motion to dismiss when compared to the timing of the *D.R. Hor-*

ton decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

(1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;

(2) January 2012: the Board in *D.R. Horton* held it to be unlawful to require employees to arbitrate employment-related claims individually, and the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful. Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not "lack[ing] a reasonable basis in fact or law," and was not filed with an illegal objective under

federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5, 744, 748, 103 S. Ct. 2161. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not "baseless." We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

No. 10-CA-038804

MURPHY OIL USA, INC. AND SHEILA M. HOBSON

Oct. 28, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

For almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims *together*, i.e., with one another, for the purpose of improving their working conditions. The core objective of the National Labor Relations Act is the protection of workers' ability to act in concert, in support of one another. Section 7 of the Act implements that objective by guaranteeing employees the "right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Our national labor policy—aimed at averting "industrial strife and unrest" and "restoring equality of bargaining power between em-

[1] 29 U.S.C. § 157. Sec. 8(a)(1) of the Act, in turn, makes it an "unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1).

ployers and employees"[2]—has been built on this basic premise. In protecting a substantive right to engage in collective action—the basic premise of Federal labor policy—the National Labor Relations Act is unique among workplace statutes.[3]

The Section 7 right to act concertedly for mutual aid and protection is not limited to supporting a labor union and pursuing collective bargaining with employers. The Supreme Court has made clear that Section 7 protects employees "when they seek to improve working conditions through resort to administrative and judicial forums. . . ."[4] The Court stated that "Congress knew well enough that labor's cause is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context" and that failing to protect such conduct "could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions.'"

Early in the Act's history, the Court's decisions established that individual agreements between employees and employer cannot restrict employees' Section 7 rights. The Court in 1940 struck down individual employment contracts that required employees to present

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[2] 29 U.S.C. § 151.

[3] See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("In contrast to the [NLRA], which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*, the [Fair Labor Standards Act] was designed to give specific minimum protections to *individual* workers. . .") (emphasis in original).

[4] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (footnote omitted).

their discharge grievances individually (foreclosing any role for a union or other representative), describing the contracts as a "continuing means of thwarting the policy of the Act."[5] The principle that individual agreements could not be treated as waivers of the statutory right to act collectively was soon reaffirmed, with the Court observing that "[w]herever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility."[6] And even before the Act was passed, Congress had declared in the Norris-LaGuardia Act that individual agreements restricting employees' "concerted activities for the purpose of . . . mutual aid or protection"—expressly including concerted legal activity—violated federal policy and were unenforceable.[7]

In *D. R. Horton, Inc.*, a case of first impression decided in 2012, the Board applied these well-established principles to hold that an employer violates the National Labor Relations Act "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial."[8] The Board reached this result relying on the substantive right, at the core of the Act, to engage in collective ac-

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[5] *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940).

[6] *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

[7] 29 U.S.C. §§ 102-104.

[8] *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014).

tion to improve working conditions. It did so "notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable," finding no conflict, under the circumstances, between Federal labor law and the FAA.[9] "Arbitration [under the FAA] is a matter of consent, not coercion,"[10] and a valid arbitration agreement may not require a party to prospectively waive its "right to pursue statutory remedies."[11] But arbitration agreements that are imposed as a condition of employment, and that compel NLRA-covered employees to pursue workplace claims against their employer individually, *do* require those employees to forfeit their substantive right to act collectively—and so nullify the foundational principle that has consistently informed national labor policy as developed by the Board and the courts. To be clear, the NLRA does not create a right to class certification or the equivalent, but as the *D. R. Horton* Board explained, it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.[12]

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[9] Id.

[10] *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989).

[11] *American Express Co. v. Italian Colors* Restaurant, __ U.S. __, 133 S. Ct. 2304, 2310 (2013) (emphasis omitted), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 fn. 19 (1985). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

[12] 357 NLRB No. 184, slip op. at 10 & fn. 24.

This case turns on the issue decided in *D. R. Horton*. The Respondent urges us to overrule that decision, which has been rejected by the U.S. Court of Appeals for the Fifth Circuit[13] and viewed as unpersuasive by decisions of the Second and Eighth Circuits (although the analysis by those courts was abbreviated).[14] Scholarly support for the Board's approach, by contrast, has been strong.[15] We have independently

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[13] *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

[14] *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298 fn. 8 (2d Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013). In a Ninth Circuit decision, the court declined to address an argument predicated on *D. R. Horton* as untimely raised, but noted other courts' disagreement with the Board's decision. *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1975 & fn. 3 (9th Cir. 2013) (as amended). Several Federal district court decisions have addressed *D. R. Horton*, as well, most rejecting the Board's view. We do not address those adverse decisions individually here, but the arguments they reflect are examined. With very limited exceptions, the Board's decisions are reviewable solely in the Federal courts of appeals, and the district courts accordingly play a limited role in the interpretation and enforcement of the National Labor Relations Act. See 29 U.S.C. § 160(e). Finally, the California Supreme Court has endorsed the Fifth Circuit's position, albeit in a case involving an arbitration agreement less restrictive than the one at issue in *D. R. Horton*. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 29, 137-143,173 Cal. Rptr. 3d 289, 299-305 (2014). State courts do not review the Board's decisions and play no role in the administration of the Act.

[15] See, e.g., Catherine L. Fisk, *Collective Action and Joinder of Parties in Arbitration: Implications of D. R. Horton and Concepcion*, 35 Berkeley J. Emp. & Labor L. 175 (2014); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Activity Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013); Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration under the Labor*

reexamined *D. R. Horton*, carefully considering the Respondent's arguments, adverse judicial decisions, and the views of our dissenting colleagues.[16] Today we reaffirm that decision. Its reasoning and its result were correct, as we explain below,[17] and no decision of

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Law, 61 U.C.L.A. L. Rev. Discourse 164 (2013); Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L. J. No. 4 (2014) (forthcoming) (available at SSRN: http://ssrn.com/abstract=2406577); Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: the False Conflict between the FAA and NLRA*, 81 Fordham L. Rev. 2945 (2013). See also Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173 (2003) (effectively anticipating Board's *D. R. Horton* decision). Professors Greene and O'Brien observe that "[a]lthough most courts have chosen to discredit the Board's *D. R. Horton* decision, few have given serious consideration to the merits of the Board's analysis and the fact that the case raises issues that have not been addressed by the Supreme Court." Id. at 32.

[16] The Respondent argues that *D. R. Horton* was not a valid decision of the Board, asserting that the Board lacked a quorum because the recess appointment of then-Member Becker was constitutionally invalid and because Member Becker's appointment had in any case expired before the decision issued. We reject those arguments. Member Becker's appointment was constitutionally proper, see *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and, for the reasons explained in *Entergy Mississippi, Inc.*, 358 NLRB No. 99, slip op. at 1-2 (2012)—which we find persuasive and endorse—his appointment had not expired. In any case, the Respondent's arguments (and other procedural attacks on *D. R. Horton*) are now moot, given our independent reexamination of *D. R. Horton* today. Putting aside any question of whether the Board can, must, or should treat *D. R. Horton* as precedential, we agree with the decision and subscribe to its reasoning.

[17] The Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties. See, e.g., *Enloe Medical Center v. NLRB*, 433 F.3d

the Supreme Court speaks directly to the issue we consider here. "The substantive nature of the right to group legal redress is what distinguishes the NLRA from every other statute the Supreme Court has addressed in its FAA jurisprudence,"[18] and the Fifth Circuit itself acknowledged the "force of the Board's efforts to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration."[19]

Having reaffirmed the *D. R. Horton* rationale, we apply it here to find that the Respondent has violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the Charging Party and three other employees filed a collective claim against the Respondent under the Fair Labor Standards Act.

834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988). As the Seventh Circuit explained, because only the Supreme Court is authorized to interpret the Act with "binding effect throughout the whole country," the Board is "not obliged to accept [the] interpretation" of any court of appeals. *Nielsen Lithographing*, supra, 854 F.2d at 1066-1067. See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L. J. 679, 705-713 (1989).

[18] Fisk, *Collective Action and Joinder of Parties in Arbitration*, supra, 35 Berkeley J. Emp. & Labor L. at 186.

[19] *D. R. Horton*, supra, 737 F.3d at 362.

FINDINGS OF FACT[20]

I. JURISDICTION

The Respondent, a Delaware corporation, with a place of business in Calera, Alabama, has been engaged in the operation of retail gasoline and diesel fueling stations. During the 12-month period prior to the Joint Motion and Stipulation, the Respondent, in conducting its business, purchased and received at its Calera, Alabama facility goods valued in excess of $50,000 directly from points outside the State of Alabama. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Respondent operates over 1000 retail fueling stations in 21 States. Prior to March 6, 2012, the Respondent required all job applicants and current employees, as a condition of employment, to execute a "Binding Arbitration Agreement and Waiver of Jury Trial" (the Agreement). The Agreement provides in relevant part as follows:

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[20] On November 29, 2012, the Respondent, the Charging Party, and the General Counsel filed with the Board a joint stipulation of facts and a motion to transfer this proceeding to the Board. The parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order based on the stipulated record. On February 11, 2013, the Board approved the stipulation of facts and granted the motion. We reaffirm and ratify those actions now. Thereafter, the Respondent, the Charging Party, and the General Counsel filed briefs.

Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration. . . . Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever.

. . . .

Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement.

. . . .

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any

group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

. . . .

INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES BETWEEN THEM RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN INDIVIDUAL AND COMPANY IS TERMINABLE AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

The Respondent required the Charging Party, Sheila M. Hobson, to sign the Agreement when she applied for employment in November 2008. Hobson was employed by the Respondent at its Calera, Alabama facility from November 2008 to September 2010. In June 2010, Hobson and three other employees (the plaintiffs) filed, in the United States District Court for the Northern District of Alabama (the district court), a collective action pursuant to 29 U.S.C. § 216(b) on behalf of themselves and other employees similarly situated, alleging violations of the Fair Labor Standards

Act (FLSA). The complaint alleged that the Respondent failed to compensate the plaintiffs for overtime and for various required work-related activities performed off the clock, including driving to the fuel stations of the Respondent's competitors to monitor fuel prices and the accuracy of their signage.

In July 2010, the Respondent filed a motion to compel the plaintiffs to arbitrate their claims on an individual basis and to dismiss the FLSA collective action in its entirety, based on the plaintiffs having executed the Agreement. The Respondent continued to seek to enforce the Agreement in approximately eight separate court pleadings and related filings made between September 2010 and February 2012.

Hobson filed an unfair labor practice charge in January 2011, and the General Counsel issued a complaint and notice of hearing in March 2011. The complaint alleged that the Respondent had been violating Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that prohibits employees from engaging in protected, concerted activities. The complaint further alleged that the Agreement violated Section 8(a)(1) because its language would lead employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board. In April 2011, the Respondent filed an answer. Later that month, the Regional Director issued an Order postponing the hearing indefinitely.

On or around March 6, 2012, the Respondent revised the Agreement. The Revised Agreement consists of the initial Agreement with the following paragraph inserted between the eighth and ninth paragraphs:

> Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act ("NLRA") to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes Individual or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board ("NLRB"), including, but not limited to, charges addressing the enforcement of the group, class or collective action waiver set forth in the preceding paragraph.

The Respondent has maintained and enforced the Revised Agreement, as a condition of employment, for employees hired after March 6, 2012. Employees hired before that date remain subject to the Agreement.

On September 18, 2012, the district court granted the Respondent's motion to compel individual arbitration of the plaintiffs' FLSA claims and further ordered that their lawsuit be stayed pending arbitration. *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-HGD-1486-S (N.D. Ala. 2012). The plaintiffs have not appealed this decision, and the Respondent has refused to arbitrate the plaintiffs' claims on a collective basis.

In October 2012, the General Counsel issued an amended complaint that includes the same allegations as the original complaint regarding the maintenance of the Agreement and further alleges that the Respondent's efforts to enforce the Agreement in court also violated Section 8(a)(1). The Respondent filed an answer to the amended complaint.

B. The Parties' Contentions

The General Counsel contends that the Agreement and Revised Agreement violate Section 8(a)(1) because they prohibit employees from exercising their Section 7 right to litigate employment-related claims concertedly, and that the Agreement is also unlawful because it would lead employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board. The General Counsel contends that the Respondent further interfered with employees' Section 7 rights by applying the Agreements to restrict employees' exercise of Section 7 activity. Specifically, it sought to enforce the Agreement against the plaintiffs through its motion to dismiss their collective FLSA action and compel individual arbitration of their claims. The General Counsel argues that the Respondent's motion and subsequent court filings had an illegal objective and thus enjoy no protection under the Petition Clause of the First Amendment.

The Respondent argues that the Board should reconsider and overrule *D. R. Horton*, which it also contends is procedurally invalid.[21] The Respondent argues that, in any case, its Agreement and Revised Agreement do not restrict the exercise of the Section 7 right

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[21] See fn. 14. supra (rejecting procedural arguments).

to engage in collective legal activity under the Board's statement in *D. R. Horton* that "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved . . . ." 357 NLRB No. 184, slip op. at 12. The Respondent contends that the Agreement and Revised Agreement preserve employees' NLRA rights, as *D. R. Horton* requires, because they do not preclude employees from filing complaints with Federal administrative agencies that have the power to file court actions on behalf of a class of employees. The Respondent further contends that because its motion to dismiss the plaintiffs' FLSA claim was successful, the motion obviously was not objectively baseless and thus was protected under the Petition Clause of the First Amendment and cannot be held to constitute an unfair labor practice.[22]

The Charging Party contends that the Respondent violated Section 8(a)(1) by maintaining its arbitration agreements because they bar joint or collective action in any forum and that the Respondent's motion to dis-

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[22] The Respondent argues that the allegation in the amended complaint that its motion to dismiss violated the Act is moot because the only relief sought by the General Counsel in the amended complaint was an order enjoining the Respondent from prosecuting the motion, and no further prosecution is possible: the court has issued its order granting the motion, and the plaintiffs did not appeal. We reject this argument. The Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies, see *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996), and our discretion is not limited by the remedies the General Counsel seeks. Moreover, contrary to the Respondent's representations, the amended complaint does not limit the remedies sought to injunctive relief; the General Counsel's brief to the Board seeks additional remedies.

miss the plaintiffs' FLSA action constitutes a separate unfair labor practice because seeking to enforce an unlawful prohibition of collective action is as much a violation of the Act as the maintenance of the prohibition itself.

C. Discussion

We begin our discussion with an examination of *D. R. Horton* and the arguments raised against it. We explain why, notwithstanding judicial criticism of the decision, echoed by the dissents, we endorse that decision. Next, applying the *D. R. Horton* rationale, we conclude that the two arbitration agreements at issue here, original and revised, violate Section 8(a)(1) of the Act as interpreted in *D. R. Horton*, contrary to the Respondent's assertions. Finally, we conclude that the Respondent's efforts to enforce its unlawful agreements also violated Section 8(a)(1).

1. *D. R. Horton* was correctly decided

The rationale of *D. R. Horton* was straightforward, clearly articulated, and well supported at every step:

> (1) Mandatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act. *D. R. Horton*, supra, 357 NLRB No. 184, slip op. at 2-3 & fn. 4 (collecting cases). Board and court decisions throughout the Act's history have recognized that right on facts comparable to the present case. In 1942, for example, the Board held that the filing of a Fair Labor Standards Act suit by three em-

ployees was protected concerted activity.[23] In a later case, the Ninth Circuit agreed with the Board that an employee's circulation of a petition among coworkers, designating him as their agent to seek back wages under the FLSA, was protected concerted activity.[24] In fact, the Board's position that litigation pursued concertedly by employees is protected by Section 7 has been upheld consistently by the Federal appellate courts,[25] and the Supreme Court has explained that the Act protects employees "when they seek to improve working conditions through resort to administrative and judicial forums."[26] Such peaceful collective action, of course, is to be preferred to the forms of economic disruption and industrial strife that Federal labor policy aims to prevent.

(2) Employer-imposed individual agreements that purport to restrict employees' Section 7 rights, including agreements that require employees to pursue claims against their employer individually, violate the National Labor Relations Act, as the Board, the courts of appeals, and the Supreme Court have held. See 357 NLRB No. 184, slip op. at 4-5 & fn. 7 (collecting cases). In an early decision under the NLRA, the Seventh Circuit upheld the Board's finding unlawful a clause in individual employment contracts that required employees to attempt to resolve disputes indi-

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[23] *Sp ndsco Oil & Royalty Co.*, 42 NLRB 942, 949-950 (1942).

[24] *Salt River Valley Water Users' Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

[25] See, e.g., *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000).

[26] *Eastex*, supra, 437 U.S. at 566.

vidually with the employer and then provided for arbitration.[27] In *National Licorice*, supra, the Supreme Court found unlawful individual employment contracts restricting a discharged employee from presenting his grievance to the employer "through a labor organization or his chosen representatives, or in any way except personally."[28] And in *J.I. Case*, supra, the Court held that individual employment contacts predating certification of a union could not limit the scope of an employer's statutory duty to bargain with the union.[29] As these cases make clear, employers may not condition employment on the waiver of employees' right to take collective action by seeking class certification or the equivalent.[30]

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[27] *NLRB v. Stone*, 125 F.2d 752 (7th Cir. 1942).

[28] 309 U.S. at 360.

[29] 321 U.S. at 339.

[30] In *D. R. Horton*, the Board was unequivocal that what Sec. 7 guarantees is the right to pursue class certification or the equivalent, not class certification itself:

> [T]here is no Section 7 right to class certification. . . . Whether a class is certified depends on whether the requisites for class certification under Rule 23 have been met. But that is not the issue in this case. The issue here is whether the [employer] may lawfully condition employment on waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23.
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> . . . . Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and

(3) Finding a mandatory arbitration agreement unlawful under the National Labor Relations Act, insofar as it precludes employees from bringing joint, class, or collective workplace claims in any forum, does not conflict with the Federal Arbitration Act or undermine its policies, because:

(a) such a finding treats an arbitration agreement no less favorably than any other private contract that conflicts with federal law;

(b) the NLRA Section 7 right to pursue joint, class, or collective legal action is a substantive right, and not merely a procedural right of the sort found in other statutes, and which arbitration agreements may effectively waive under the FAA;

(c) not only does the text of the FAA fail to establish that an arbitration agreement inconsistent with the NLRA is nevertheless enforceable, but the savings clause in Section 2 of the FAA affirmatively provides that such a conflict with federal law is grounds for invalidating the agreement; and

(d) even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act—which by its terms prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a" lawsuit arising out of a labor dispute[31]—indicates that

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their employer remains free to assert any and all arguments against certification (other than the [arbitration agreement]).

D. R. Horton, supra, 357 NLRB No. 184, slip op. at 10 & fn. 24.

[31] 29 U.S.C. § 104(d).

the FAA would have to yield insofar as necessary to accommodate Section 7 rights.

Id., slip op. at 7-12.

With due respect to the courts that have rejected *D. R. Horton*, and to our dissenting colleagues, we adhere to its essential rationale for protecting workers' core substantive right under the National Labor Relations Act, and we now explain why. Our primary focus is properly on the decision of the Fifth Circuit, the only Federal appellate court to have examined *D. R. Horton* directly on review and to have fully articulated its view that the Board erred. We also address the separate views of our dissenting colleagues, Member Johnson and Member Miscimarra, who essentially endorse the Fifth Circuit's decision.

a. The Fifth Circuit's decision in D. R. Horton

We first summarize the decision of a divided panel of the Fifth Circuit in *D. R. Horton*, then explain those aspects of the court's reasoning that prevent us from agreeing with the panel majority.

(1)

Preliminarily, the Fifth Circuit majority acknowledged that "cases under the NLRA give some support to the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7." But the court concluded that "[c]aselaw under the FAA points . . . in a different direction than the course taken by the Board"—despite conceding "that none of those cases considered a Section 7 right to pursue legal claims concertedly." 737 F.3d at 357 & fn. 8. The court observed that the "use of class action procedures [and presumably similar

claims-aggregating devices] is not a substantive right" even with regard to the NLRA, citing decisions involving "various employment-related statutory frameworks"[32] and dismissing the claim "that the NLRA is essentially *sui generis*." Id. at 357.

The court then examined the Board's reasoning by applying a framework derived from the Supreme Court's FAA jurisprudence. The court's starting premise was the "requirement under the FAA that arbitration agreements must be enforced according their terms," subject to two exceptions: (1) that an arbitration agreement may be invalidated under the grounds recognized under the FAA's savings clause;[33] and (2) that another statute's "contrary congressional command" may preclude application of the FAA. Id. at 358. Neither exception applied, the court concluded.

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[32] The primary authority cited by the Fifth Circuit was the Supreme Court's decision in *Gilmer*, supra, which involved the Age Discrimination in Employment Act. The *D. R. Horton* Board addressed *Gilmer* and distinguished it from cases like this one. 357 NLRB No. 184, slip op. at 9-10. In the present case, the issue is not whether access to class or collective procedures is necessary to effectively vindicate rights under the statute that authorized the underlying legal claims (the Fair Labor Standards Act). The question, rather, is whether the mandatory arbitration agreements "violate[d] the substantive rights vested in employees by *Section 7 of the NLRA*" to pursue their FLSA claims collectively. Id. at 9 (emphasis added).

[33] Sec. 2 of the FAA provides for revocation of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

First, invoking the Supreme Court's decision in *Concepcion*,[34] the court held that while the Board's interpretation of the FAA "savings clause" was "facially neutral[,] requiring only that employees have access to collective procedures in an arbitral or judicial forum," it had the impermissible effect of "disfavoring arbitration," because "[r]equiring a class mechanism [in some forum] is an actual impediment to arbitration." Id. at 359-360.

Second, the court concluded that the NLRA did not "contain[] a congressional command to override the FAA," whether in its text or its legislative history or because of an "inherent conflict" between the FAA and NLRA's purpose. Id. at 360-361. Section 7 of the NLRA was *not* such a command because it was merely "general language" that did "not explicitly provide for a collective [legal] action, much less the procedures such an action would employ" and, indeed, did not even create a private cause of action against employers. Id. at 360 & fn. 9. In turn, there was no inherent conflict between the FAA and the NLRA, because "courts repeatedly have understood the NLRA to permit and require arbitration"—here, the Fifth Circuit panel cited only decisions involving *collectively bargained* arbitration provisions[35]—and because the "right to collective action . . . cannot be successfully defended on the policy ground [that] it provides employees with greater bargaining power," in light of decisions applying the FAA in cases involving enforcement of *other* Federal

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[34] *AT & T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011).

[35] The court relied primarily on the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

workplace statutes. Id. at 361.[36] The court accorded "some importance" to the fact that the NLRA was enacted and reenacted "prior to the advent in 1966 of modern class action practice." As for the Board's reliance on the Norris-LaGuardia Act, the court—in a footnote observing that this statute is "outside the Board's interpretive ambit"—summarily rejected the "Board's reasoning" as "unpersuasive." Id. at 362 fn. 10.[37]

(2)

The Supreme Court has, in its own words, "emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."[38] We begin, then, with those aspects of *D. R. Horton* that turn on the understanding of national labor policy, which is built on the principle that workers may act collectively—at work and in other forums, including the courts—to improve their working conditions. The Fifth Circuit's decision gives too little weight to this policy. We reiterate a crucial point made by the *D. R. Horton* Board: that the Board, like the courts,

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[36] The court's principal authority was the Supreme Court's decision in *Gilmer*, supra.

[37] Circuit Judge Graves dissented in relevant part, endorsing the Board's position in substantially all respects. 737 F.3d at 364 (dissenting opinion). He agreed with the Board that the mandatory arbitration agreement interfered with employees' substantive rights under Sec. 7 of the NLRA; that there was no conflict between the NLRA and the FAA, given that statute's savings clause; and that if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act indicated that the FAA would have to yield. Id. at 364-365.

[38] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990).

must carefully accommodate *both* the NLRA and the FAA. 357 NLRB No. 184, slip op. at 8 & fn. 19. The Fifth Circuit's decision does not reflect such an accommodation. It views the National Labor Relations Act and its policies much more narrowly than the Supreme Court has, while treating the Federal Arbitration Act and its policies as sweeping far more broadly than that statute or the Supreme Court's decisions warrant. "[N]o legislation pursues it purposes at all costs,"[39] and the FAA is no exception. The costs to Federal labor policy imposed by the Fifth Circuit's decision would be very high. The substantive right at the core of the NLRA would be severely compromised, effectively forcing workers into economically disruptive forms of concerted activity and threatening the sort of "industrial strife" that Congress recognized as harmful. There is nothing in the text of the FAA, in its policies, or in the Supreme Court's jurisprudence that compels those costs.

The Fifth Circuit understood *D. R. Horton* as simply another in a series of cases to be decided under the established framework of the Supreme Court's Federal Arbitration Act jurisprudence, and not as a case presenting novel questions. The court's first step was to determine that the pursuit of legal claims concertedly is *not* a substantive right under Section 7 of the NLRA. We cannot accept that conclusion; it violates the long-established understanding of the Act and national labor policy, as reflected, for example, in the Supreme Court's decision in *Eastex*, supra. Rather, we think the *D. R. Horton* Board was clearly correct when

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[39] *Italian Colors*, supra, 133 S. Ct. at 2309, quoting *Rodriguez v. U.S.*, 480 U.S. 522, 525-526 (1987) (per curiam).

it observed that the "right to engage in collective action—including collective *legal* action—is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 NLRB No. 184, slip op. at 11 (emphasis added in part).[40]

Section 7 provides that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Under Section 8(a)(1) of the Act, it is an unfair labor practice "for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). Under the NLRA's statutory scheme, employees' Section 7 rights are enforced solely by the Board—there is no private right of action under the Act—through the procedures established by Section 10. 29 U.S.C. § 160. Notably, Section 10(a) provides that the Board's authority to prevent and remedy unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been

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[40] The source of the language of Sec. 7, as the Supreme Court has explained, is the Norris-LaGuardia Act, and that statute expressly protects "[b]y all lawful means aiding any person participating or interested in any labor dispute who is . . . prosecuting, any action or suit in any court of the United States or of any State." 29 U.S.C. § 104. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 834-835 (1984) (upholding Board rule that individual employee's assertion of right under collective-bargaining agreement was protected concerted activity). After tracing the origins of Sec. 7, the *City Disposal* Court observed that "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with another in any particular way." Id. at 835.

or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a).

The rights uniquely guaranteed by Section 7 (with the exception of the right to refrain from concerted activity) are, as the Supreme Court has observed, "*collective* rights,"[41] and all of them are *substantive* rights. As the *D. R. Horton* Board indicated, Section 7 protects a wide range of concerted activity by employees who, like those here, seek to compel their employer's compliance with the Fair Labor Standards Act. 357 NLRB No. 184, slip op. at 3-4. Section 7 protects picketing. It protects a consumer boycott. It protects a strike. And as numerous Board and judicial decisions make quite clear, it protects, as a substantive right, workers joining together to pursue legal redress in a State or Federal court. There is no basis in the Act or its jurisprudence to carve out concerted *legal* activity as somehow entitled to less protection than other concerted activity. Indeed, concerted legal activity would seem, if anything, to be a *favored* form of concerted activity under the Act because it would have the least potential for economic disruption, the harm that Congress sought to prevent in enacting the NLRA, as Section 1 of the Act explains. 29 U.S.C. § 151. Blocking this channel would only push employees toward other, more disruptive forms of concerted activity. We doubt seriously, meanwhile, that any court, would uphold—or could uphold, consistent with either the NLRA or the Norris-LaGuardia Act, with its

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[41] *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975) (emphasis added) (Sec. 7 rights "are, for the most part, collective rights, rights to act in concert with one's fellow employees").

longstanding prohibition against "yellow dog" contracts—a mandatory, individual arbitration agreement that compelled employees to give up the right to strike or picket, to hold a march or rally, to sign a petition, or to seek a consumer boycott, as a means to resolve a dispute with their employer over compliance with a federal statute. All of these forms of concerted activity are protected by Section 7, as is concerted legal activity.

Section 7, then, does not create *procedural* rights in the sense that the Fifth Circuit invoked. The collective rights created by Section 7, by definition, necessarily involve group action, and all are enforced one way: by the Board, through its processes. This is in clear contrast with statutes like the Fair Labor Standards Act or the Age Discrimination in Employment Act, which establish purely individual rights, create private rights of action, and authorize group litigation only as a means to vindicate individual rights. Enacted after the NLRA, these statutes provide additional legal rights and remedies in the workplace, but in no way supplant, or serve as a substitute for, workers' basic right under Section 7 to engage in concerted activity as a means to secure whatever workplace rights the law provides them. In this case, for example, while the underlying legal claims involved the FLSA, it is the NLRA that is the source of the relevant, substantive right to pursue those claims concertedly. In short, contrary to the Fifth Circuit's view, the National Labor Relations Act is not simply another employment-related Federal statute. "[I]t is protection for joint employee action that lies at the heart of

the Act."[42] The NLRA, then, is *sui generis*, and its special character must be taken into account in cases like this one.

Because mandatory arbitration agreements like those involved in *D. R. Horton* purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid. The Supreme Court has explained recently that the Federal policy favoring arbitration, however liberal, does have limits. It does not permit a "prospective waiver of a party's *right to pursue* statutory remedies," such as a "provision in an arbitration agreement forbidding the assertion of certain statutory rights."[43] Insofar as an arbitration agreement prevents employees from exercising their Section 7 right to pursue legal claims concertedly—by, as here, precluding them from filing joint, class, or collective claims addressing their working conditions in *any* forum, arbitral or judicial—the arbitration agreement amounts to a prospective waiver of a right guaranteed by the NLRA. (The Act, of course, does not create an entitlement to class certification or the equivalent; it protects the right to *seek* that result.) Being required to proceed individually is no proper substitute for proceeding together, insofar as otherwise legally permitted,[44] and only channels employee collective activ-

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[42] *Meyers Industries*, 281 NLRB 882, 883 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[43] *Italian Colors*, supra, 133 S. Ct. at 2310, quoting *Mitsubishi*, supra, 473 U.S. at 637 (emphasis in original).

[44] As explained, the NLRA forecloses employers from imposing on employees a waiver of the right to seek to pursue their legal claims together. It does not prevent employers from opposing

ity into disruptive forms of action. The "remedial and deterrent function"[45] of the NLRA, which protects the right to concerted legal action, cannot possibly be served by an *exclusive* arbitral forum that denies the right of employees to proceed collectively.

But even applying the framework utilized by the Fifth Circuit, *D. R. Horton* was correctly decided. The court stated that the FAA requires that arbitration agreements must be enforced according to their terms, with two exceptions. Both exceptions apply here. First, the mandatory arbitration agreement is invalid under Section 2 of the FAA, the statute's savings clause, which provides for revocation "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court's decisions in *National Licorice* and *J.I. Case*, supra, establish that *any* individual employment contract that purports to extinguish rights guaranteed by Section 7 of the National Labor Relations Act is unlawful. If such contracts were allowed to stand, then (in the Supreme Court's words) the Act "would be reduced to a futility."[46] "It is . . . well established," the Supreme Court explained later, "that a federal court has a duty to determine whether a contract violates federal law before enforcing it"—holding that illegality under the NLRA is a valid defense.[47] In rejecting the Board's position in *D. R. Horton*, the Fifth Circuit

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class certification or the equivalent of grounds other than waiver. See *D. R. Horton*, supra, 357 NLRB No. 184, slip op. at 10 & fn. 24.

[45] *Gilmer*, supra, 500 U.S. at 28, quoting *Mitsubishi*, supra, 473 U.S. at 637.

[46] *J.I. Case*, supra, 321 U.S. at 337.

[47] *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982).

failed even to cite *National Licorice* or *J.I. Case*, much less attempt to reconcile them with the result reached by the court.

Instead, the Fifth Circuit relied on the Supreme Court's decision in *Concepcion*, which held that the FAA preempted a California State law doctrine finding class-action waivers in consumer contracts unconscionable. There the court stated that requiring the availability of class procedures "interfere[d] with the fundamental attributes of arbitration," and was an impermissible obstacle to the pro-arbitration objectives of the FAA.[48] Cases like *D. R. Horton*, however, present no issue of Federal preemption. Rather, they require accommodating two *Federal* statutory schemes: the NLRA and the FAA. The *D. R. Horton* Board explained, with care, why in the context of cases like this one, the NLRA and the FAA are "capable of coexistence."[49] The Fifth Circuit, in contrast, did not explain how upholding the mandatory arbitration agreement could be reconciled with the NLRA. Nor did the court explain why, in the event of a conflict between the NLRA and the FAA, it would be the NLRA that would be required to yield. The Federal "courts are not at liberty to pick and choose among congressional enactments."[50]

Assuming, again, that the Fifth Circuit's analytical framework was appropriate, the *D. R. Horton* Board was correct that the second exception to application of the FAA was implicated here, because Section 7 of the

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[48] *Concepcion*, supra, 131 S. Ct. at 1748.

[49] *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[50] Id.

NLRA amounts to a "contrary congressional command"[51] overriding the FAA. We see no compelling basis for the court's conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed. That standard, as already suggested, reflects a fundamental misunderstanding of the NLRA and the collective, substantive rights it creates for the Board to enforce. The right to engage in concerted legal activity is plainly authorized by the broad language of Section 7, as it has been authoritatively construed by the Supreme Court in *Eastex*, supra, as part of the protected "resort to administrative and judicial forums."[52] And Section 10(a) of the Act, as pointed out, provides that the Board's authority "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." An arbitration agreement like the one here, even if it did not run afoul of the FAA's savings clause, would seem to be precisely the sort of "means of adjustment . . . established by agreement" that *cannot* affect the Board's enforcement of Section 7. However, the Fifth Circuit's treatment of the agreement produces that precise result.[53] Under the court's view, because (and only because) the employer's restriction on protected concerted activity is embodied in an arbitration agreement, it is lawful and cannot be invali-

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[51] *CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 668-669 (2012).

[52] 437 U.S. at 566.

[53] Cf. *CompuCredit*, supra, 132 S. Ct. at 672 (examining statutory provisions specifically addressing predispute arbitration).

dated by the Board. To be sure, the NLRA does not explicitly override the FAA—but for an obvious reason: neither when the NLRA was enacted in 1935, nor when it was reenacted in 1947, had the FAA ever been applied in connection with individual employment contracts. The issue of the FAA's applicability, in fact, was not resolved until much later, when the Supreme Court read the exemption in Section 1 of the FAA (which excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce") to refer only to transportation workers.[54]

Nor are we persuaded by the Fifth Circuit's view that there is no inherent conflict between the NLRA and the FAA. That the courts have understood the NLRA to permit *collectively bargained* arbitration provisions is irrelevant to the proper treatment of employer-imposed mandatory individual arbitration agreements. Section 1 of the NLRA explicitly declares that the "policy of the United States" is to "encourage[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. That policy is explicitly based on the Congressional finding that:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce. . . .

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[54] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (construing 9 U.S.C. § 1).

Id. Section 7 of the NLRA, the Supreme Court has explained, embodies the effort of Congress to remedy this problem.[55] An individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen bargaining representative and an employer that has complied with the statutory duty to bargain in good faith. The Fifth Circuit, in our view, failed to come to terms with the unique provisions and policies of the NLRA.

Also troubling was the Fifth Circuit's treatment of the Norris-LaGuardia Act. As explained, that statute provided the source for the language of Section 7 of the NLRA.[56] The Board's decision in *D. R. Horton* is grounded in NLRA, Section 7, but it was entirely appropriate for the Board to look to the Norris-LaGuardia Act both in identifying Federal labor policy and in seeking an accommodation between Federal labor policy and the Federal policy favoring arbitration. That the Board may not be entitled to judicial deference in interpreting the Norris-LaGuardia Act cannot mean that the Board's statutory interpretation is somehow illegitimate or necessarily incorrect. The court, for its part, did not explain why the Norris-LaGuardia

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[55] *City Disposal*, supra, 465 U.S. at 835 ("[I]t is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").

[56] See id; *Eastex*, supra, 437 U.S. at 564 fn. 14.

Act—enacted in 1932, 7 years *after* enactment of the FAA—has no bearing on a case like this one, given that the statute's explicit language

> (1) declares that the "public policy of the United States" is to insure that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection;"[57]
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> (2) specifies that protected activities include "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state;"[58]
>
> (3) provides that "[a]ny undertaking or promise . . . in conflict with the public policy declared [in the Act] is declared to be contrary to the public policy of the United States [and] shall not be enforceable in any court of the United States;"[59] and
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> (4) repeals "[a]ll acts and parts of acts in conflict with" its provisions.[60]

It is hardly self-evident that the FAA—to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees—survived the enactment of the Norris-LaGuardia Act and its sweeping prohibition of "yellow dog" contracts. "[T]he [Norris-

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[57] Norris-LaGuardia Act, Sec. 2, 29 U.S.C. § 102.

[58] Norris-LaGuardia Act, Sec. 4, 29 U.S.C. § 104.

[59] Norris-LaGuardia Act, Sec. 3, 29 U.S.C. § 103.

[60] Norris-LaGuardia Act, Sec. 15, 29 U.S.C. § 115.

LaGuardia Act's] language seemingly requires a textualist to find that it trumps the FAA where the two conflict."[61]

For all of these reasons, we are not persuaded by the Fifth Circuit's view that the *D. R. Horton* Board erred. We turn next to the decisions of two other Federal appellate courts, which have also rejected *D. R. Horton*, but provided much less comprehensive rationales for doing so.

b. The decisions of the Eighth and Second Circuits rejecting D. R. Horton

Among the reasons given by the Fifth Circuit for not adopting the Board's view was a reluctance "to create a circuit split," citing decisions from three other circuits. 737 F.3d at 362. Those decisions, however, add little to the equation here, given their limited analysis of the issue. Nothing in the *two* other court of appeals decisions that reject *D. R. Horton* persuades us here.

To begin, the Fifth Circuit court cited, as having rejected *D. R. Horton*, a Ninth Circuit decision that was later *amended* so that it specifically refrained from deciding the issue.[62] A cited Second Circuit decision, in turn, addressed *D. R. Horton* only in a footnote that offered virtually no analysis of the issue beyond endorsing the decision of the Eighth Circuit in

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[61] Sullivan & Glynn, *Horton Hatches the Egg*, supra, 64 Ala. L. Rev. at 1039.

[62] See *Richards*, supra, 744 F.3d at 1075 & fn. 3 (amended decision). The Fifth Circuit cited the original Ninth Circuit decision, reported at 734 F.3d 871.

Owen v. Bristol Care, supra.[63] We now turn to that decision.

In *Owen v. Bristol Care*, the court reversed a district court's denial of a motion to compel arbitration in a suit asserting FLSA claims and seeking class action certification. The court rejected an argument that the legislative history of the NLRA "indicated a congressional command to override the FAA." 702 F.3d at 1053. The Board's decisions, by contrast, are predicated on the text of the NLRA and longstanding constructions of the Act by the Board and the Supreme Court, not on legislative history.

Without referring to the Board's analysis in *D. R. Horton*, the Eighth Circuit also rejected the employees' argument based on the Norris-LaGuardia Act, observing that the 1947 "decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes." 702 F.3d at 1053. With respect, that conclusion is untenable.[64] First enacted in 1925, 43 Stat. 883—before passage of the Norris-LaGuardia Act (1932) and the National Labor Relations Act (1935)—the FAA was reenacted and codified in 1947 as Title 9 of the United States Code. But that action had no substantive effect. "Under established canons of statutory construction, 'it will not be inferred that Congress, in

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[63] *Sutherland*, supra, 726 F.3d at 297 fn. 8.

[64] For an exhaustive critique of the Eighth Circuit's view, see Sullivan & Glynn, *Horton Hatches the Egg*, supra, 64 Ala. L. Rev. at 1046-1051. Professors Sullivan and Glynn advisedly describe the theory that the FAA is the later enacted law as "nonsensical." Id. at 1020.

revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'"[65] There is no such clearly expressed Congressional intention either in the statute codifying the FAA, see 61 Stat. 669, or in its legislative history, nor did the Eighth Circuit point to one. It seems inconceivable that legislation effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent.

As for *D. R. Horton* itself, the Eighth Circuit stated that the decision "carries little persuasive authority in the circumstances presented." 702 F.3d at 1053. The court rejected the holding of *D. R. Horton* because it "owe[d] no deference to [the Board's] reasoning." 702 F.3d at 1054. That bare rationale cannot be sufficient. First, to the extent that the issue cannot be properly decided without weighing the National Labor Relations Act and its policies, the Board is demonstrably entitled to *some* deference, as the primary interpreter of Federal labor law. Second, the Board's understanding of Federal law outside the NLRA may in fact be correct, regardless of whether deference is claimed by the Board or owed by the courts. The issue of deference, in other words, is not the ultimate one.

The Eighth Circuit's *Owen* decision thus adds little by way of legal analysis to the decision of the Fifth

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[65] *Finley v. U.S.*, 490 U.S. 545, 554 (1989), quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). See also *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961) (rejecting argument that particular statute was later enactment where its predecessor provision "had long been on the books").

Circuit, and the Second Circuit's unelaborated endorsement of the Eighth Circuit's view adds even less.

c. Member Johnson's dissent

The separate dissents of our colleagues, Member Johnson and Member Miscimarra level many and varied criticisms at *D. R. Horton*, the most substantial of which we have already addressed in responding to the decisions of the Fifth and Eighth Circuits. We therefore confine ourselves to the novel points made by our colleagues. They leave us unpersuaded.

We address Member Johnson's dissent first. For Member Johnson, the Board's overriding concern should be to avoid, at all costs, a conflict with the Federal courts and instead to acknowledge the extraordinary strength of the Federal policy favoring arbitration, reflected (in our colleague's view) in a long string of Supreme Court decisions. That path of least resistance, however, amounts both to abdicating the Board's responsibility to administer the National Labor Relations Act as Congress intended—by permitting Section 7 to be effectively nullified—and to adopting a view of the Federal Arbitration Act that goes far beyond anything the Supreme Court has held.[66] As two scholars recently stated, the "expansion of the FAA cannot continue indefinitely," because "[a]t some point, the irre-

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[66] To quote one scholar, "[n]one of the Court's class-action waiver jurisprudence under the FAA addresses a case in which the fundamental statutory protection is the right of employees to act as a group in improving their working conditions; all of them addressed situations in which the underlying right was an individual right to be free from unfair market behavior." Fisk, *Collective Actions and Joinder of Parties in Arbitration*, supra, 35 Berkeley J. Emp. & Lab. L. 175, 186.

sistible force of that statute must meet the immovable object of federal labor law."[67] Nor can we accept the strong implication in Member Johnson's dissent that concerted legal activity to protect employees' rights, at least when it takes the form of a class action, is somehow illegitimate because it may result in significant legal liability for employers.[68] Our analysis surely must presume that employees will join together (in some cases, if not all) to pursue claims against their employers that are well grounded in Federal or State laws protecting American workers and that they will properly seek to use existing legal rules that authorize joint, collective, or class actions. That concerted legal activity may be a successful means of vindicating employees' legal rights cannot be a legitimate reason to disfavor it.[69]

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[67] Sullivan & Glynn, *Horton Hatches the Egg*, supra, 64 Ala. L. Rev. at 1020.

[68] It seems plausible, at least, that the "notion of collective power is precisely what underlies Section 7," but that "[t]his power is the source of much resistance to class actions and the efforts to use arbitration to eliminate class actions." Hodges, supra, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, supra, 38 Wake Forest L. Rev. at 216 (footnotes omitted).

[69] Member Johnson says that we "totally misapprehend the interest at issue here." To the contrary, we understand Member Johnson's position that the abuse of class actions and similar procedural mechanisms threatens to impose large and unwarranted liability on employers. If his position were correct, then it would be for Congress, the State legislatures, and the courts to address those abuses directly, not for the Board to distort Federal labor law and policy in an effort to provide an alternative solution.

(1)

Member Johnson's position here rests, in important part, on the remarkable premise that employees' concerted legal activity deserves very little, if any, protection under Section 7 of the NLRA. Such an argument has virtually no support in the text of Section 7, in Board doctrine, in the decisions of the Federal appellate courts (including the decisions that reject *D. R. Horton*), or in Supreme Court jurisprudence.

To begin, we reject the suggestion that filing joint, class, or collective claims is rarely, if ever, protected by Section 7. By its terms, Section 7 protects employee activity that is "concerted" and engaged in "for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Under the Board's well-established test, concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[70] The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[71] The requirement of "mutual aid or protection," in turn, is satisfied when, in the words of the Supreme Court, employees "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the imme-

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[70] *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[71] *NLRB v. City Disposal Systems, Inc.*, supra, 465 U.S. at 835.

diate employee-employer relationship," such as "resort to administrative and judicial forums."[72]

Entirely consistent with these principles, the Board in *Salt River Valley*, more than 60 years ago, had no difficulty finding that an individual employee had engaged in protected concerted activity when he circulated a petition among coworkers seeking designation as their agent to pursue Fair Labor Standards Act claims against their employer.[73] Rejecting the employer's argument, the Board observed that "[g]roup action is not deemed a prerequisite to concerted activity for the reason that a single person's action may be the preliminary step to acting in concert."[74] The Board also rejected the assertion that the employee's activity "was not for 'mutual aid or protection,'" "because the statutory rights under the Fair Labor Standards Act are individual rights not increased by joint action"; the "end effect" of the employee's activity, the Board pointed out, might well be a successful lawsuit for backpay benefitting other employees.[75] The Board's decision was affirmed in its entirety by the Ninth Circuit.

Much of Member Johnson's criticism is focused on the *D. R. Horton* Board's statement that "an *individual* [employee] who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected

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[72] *Eastex*, supra, 437 U.S. at 565.

[73] *Salt River Valley Water Users Assn.*, 99 NLRB 849 (1952), enfd. 206 F.2d 325 (9th Cir. 1953). The *D. R. Horton* Board correctly relied on this decision. 357 NLRB No. 184, slip op. at 2.

[74] Id. at 853.

[75] Id. at 853-854.

by Section 7." 357 NLRB No. 184, slip op. at 3 (emphasis added). Today's case, of course, involves an FLSA collective action filed by *three* employees. This would seem to fit even Member Johnson's restrictive view of concerted activity, which (to quote the Supreme Court's decision in *City Disposal*) would limit the concept to cases "in which two or more employees are working together at the same time and the same place toward a common goal."[76] The *City Disposal* Court rejected such a "narrow meaning" of concert, upholding the Board's position that an individual employee who singly asserts his right under a collective-bargaining agreement is engaged in concerted activity. Indeed, the filing of a class or collective action by an individual employee is analogous to the individual conduct at issue in *City Disposal*. By definition, such an action is predicated on a statute that grants rights to the employee's coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own. Plainly, the filing of the action contemplates—and may well lead to—active or effective *group* participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential "to initiate or to induce or to prepare for group action," in the phrase of *Meyers II*, supra—collectively seeking legal redress—that satisfies the concert requirement of Section 7. There is no sound

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[76] *City Disposal*, supra, 465 U.S. at 831.

reason, then, to hold that *only* face-to-face activity preparatory to filing a suit can be protected by Section 7.[77]

In any case, Member Johnson also neglects the Board's approach to the concert requirement in situations like that posed in *D. R. Horton*, which involved only a facial challenge to a mandatory arbitration agreement, i.e., the unfair labor practice alleged was the mere maintenance of the agreement as a term and condition of employment. Consistent with Board precedent, the *D. R. Horton* Board properly treated the ar-

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[77] To the extent that Member Johnson argues that his own, narrow view of concerted activity is mandated by the Act, we disagree. "*City Disposal* makes unmistakably clear that . . . neither the language nor the history of [S]ection 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA." *Prill v. NLRB*, 755 F.2d 941, 952 (D.C. Cir. 1985). Member Johnson misunderstands our discussion of *City Disposal* when he insists that we somehow seek "to resurrect the *Alleluia Cushion* theory of implied concertedness." That case involved an individual employee who—without the involvement of any other employee—filed an individual complaint with the California Occupational Safety and Health Administration. There was "no evidence that [the employee] purported to represent the other employees" or that he made any "efforts . . . to seek his fellow employees' aid in pursuing the complaints." *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975). The *Alleluia Cushion* Board did not view the complaint as an attempt to induce group action, nor did it consider whether the administrative process contemplated participation by multiple employees. Instead, citing public policy, the Board found the employee's activity concerted because he invoked a statute that was intended to benefit his coworkers, whose consent to his actions was presumed. Id. Neither *D. R. Horton* nor our decision today relies on this rationale.

bitration agreement as a workplace rule restricting Section 7 activity. 357 NLRB No. 184, slip op. at 4.[78] The vice of maintaining such a rule is that it reasonably tends to chill employees in the exercise of their statutory rights. As a result, the rule may be unlawful even if there is no showing that a covered employee ever engaged in the protected concerted activity prohibited by the rule, precisely because the rule itself discourages employees from doing so.[79]

Member Johnson asserts that "a particular litigation mechanism is, at most, a peripheral concern to the Act, especially where the mechanism is established and defined by statutes *different* than the Act, to handle claims under *different* statutes than the Act," because the Act is intended to remedy the inequality of bargaining power between employees and employers and litigation involves adjudication, not bargaining. Here, too, Member Johnson's narrow position is fundamentally mistaken. We are dealing with litigation that seeks to change employees' terms and conditions

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[78] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007) (employer policy unlawful because reasonably interpreted to require resort to arbitration and to preclude filing of Board charges).

[79] See *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 2 (2014) ("[A]n employer may violate Section 8(a)(1) even where an employee has not engaged in protected concerted activity—if, for example, the employer maintains a rule that reasonably would be interpreted by employees as prohibiting Section 7 activity. . . ."), citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (mere maintenance of work rule by employer will violate Act where rule likely to have chilling effect), enfd. 203 F.3d 52 (D.C. Cir. 1999).

of employment. In an unorganized workplace, those terms and conditions—including, for example, both wages and mandatory arbitration agreements—are established unilaterally by the employer. The employer's imposition of a mandatory arbitration agreement requiring employees to bring all workplace claims individually—and forbidding them access to any group procedure—reflects and perpetuates precisely the inequality of bargaining power that the Act was intended to redress. Precluding employees from joining together to press their workplace claims strips them of the collective, equalizing power that Section 7 envisions. Of course, as a practical matter, litigation routinely does involve not only adjudication by a court or arbitrator, but also bargaining between the parties: that is how cases settle, as most of them do.

There is no merit, in turn, to Member Johnson's claim that "*D. R. Horton* attempts to transform Section 7 into a 'procedural superhalo' that authorizes class and collective litigation even where Congress and the courts do not." On this point, *D. R. Horton* could not have been clearer, taking care to explain that "there is no Section 7 right to class certification" and that the Board's holding does not "guarantee[] class certification, . . . [but] only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." 357 NLRB No. 184, slip op. at 10 & fn 24. What *D. R. Horton* prohibits is unilateral action, by an employer, that purports to completely deny employees access to class, collective, or group procedures that are otherwise available to them under statute or rule. The Board did not (and, of course, could not) require a

court or arbitrator to certify a class in a particular case, to permit a collective action to go forward, or to allow joinder. Nor did the Board require Congress or the States to create or maintain any type of group procedure at all.

Member Johnson claims to find support for his views in the assertion that "there was no such thing as a class or collective action in any modern sense when the [NLRA] was passed in 1935." But the suggestion that Section 7 covers only those types (or subtypes) of protected concerted activity that existed in 1935 is untenable. The language of Section 7 is general and broad; there is no indication in the statutory text, in the legislative history, or in the Supreme Court's decisions that the 1935 Congress intended to fix, for all time, the ways in which employees would be able to engage in protected efforts to improve their working conditions. To take one obvious example, the use of modern communication technologies such as social media to pursue unionization is obviously protected, regardless of whether workers during the Depression had access to Facebook. But more to the point, concerted legal activity by employees was hardly unknown in 1935. It was specifically protected by Section 4(d) of the Norris-LaGuardia Act. And while it is true that the collective-action provision of the Fair Labor Standards Act was not adopted until 1938, that device, insofar as it permitted one employee to assert claims on behalf of similarly-situated employees, was hardly an extraordinary innovation—one scholar, indeed, describes it as "traditional."[80] Group litigation was not in-

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[80] Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay*

vented in 1938 or in 1966; it has long been part of the Anglo-American legal tradition, reflected (for example) in the Federal Equity Rules even before the Federal Rules of Civil Procedure were first adopted.[81] "Long before crystallization of the national labor policy . . . [in the Norris-LaGuardia Act and the NLRA], employees had resorted to lawsuits to vindicate their rights against employers, although those rights were considerably narrower than they are today."[82]

Finally, we cannot agree with Member Johnson's argument that in assessing mandatory arbitration provisions like the one involved in *D. R. Horton*, the Board not only must engage in a balancing test, but must conclude that an employer's supposedly legitimate interest in completely preventing employees from seeking to pursue their legal claims against the employer jointly, in any judicial or arbitral forum, actually *outweighs* employees' Section 7 rights. To state the argument is to refute it. Here, again, Member Johnson distorts *D. R. Horton*, which properly acknowledged the obvious: that employees have no Section 7 right to class certification and, in turn, that employers may lawfully oppose class certification on any legally available ground *other* than an unlawful waiver in a mandatory arbitration agreement. 357 NLRB No. 184, slip op. at 10 fn. 24. That holding, of

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Act through the Fair Labor Standards Act, 71 Georgetown L. J. 119, 124 (1982).

[81] See G.W. Foster, Jr. *Jurisdiction, Rights, and Remedies for Group Wrongs under the Fair Labor Standards Act: Special Federal Questions*, 1975 Wis. L. Rev. 295, 323 & fn. 100 (1975).

[82] Sullivan & Glynn, *Horton Hatches the Egg*, supra, 64 Ala. L. Rev. at 1015-1016 & fn. 5-8 (collecting cases).

course, reflects a proper balancing of the respective rights of employees and employers. It is untenable to claim, as Member Johnson does, that prohibiting employees from pursuing their workplace claims collectively results only in "relatively slight" interference with Section 7 rights, when it actually extinguishes them.

Just as mistaken are Member Johnson's arguments that attempt to equate the situation in *D. R. Horton*, where an employer has imposed arbitration agreements on individual employees who lack union representation, with a situation in which a labor union has exercised its statutory authority to permit the individual presentation of grievances to the employer or has agreed in collective bargaining to an arbitration provision covering employees' statutory claims. Neither Section 9(a) of the Act[83] or the Supreme Court's decision in *14 Penn Plaza*, supra, has any bearing here. To posit that they do is to say that union representation makes no difference in the workplace—the antithesis of the NLRA. That an employer may collectively bargain a particular grievance-and-

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[83] Sec. 9(a), which grants properly chosen unions exclusive status as the representative of bargaining unit employees, also contains a proviso permitting individual employees to "present grievances to their employer and have such grievances adjusted, without the intervention" of the union "as long as the adjustment is not inconsistent with the terms" of an existing collective-bargaining agreement. 29 U.S.C. § 159(a). The language of Sec. 9(a) demonstrates that "Congress clearly indicated an intent to ensure that the institutional role of the collective-bargaining representative of all the employees in a bargaining unit is not subordinated to that of individual employees." *Postal Service*, 281 NLRB 1015, 1016 (1986). Member Miscimarra's dissent relies heavily, but mistakenly, on Sec. 9(a), and we address his arguments (which Member Johnson joins) below.

arbitration procedure with a union is not to say that it may unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a procedure that vitiates Section 7 rights, simply because it takes the form of an agreement.

In *National Licorice* and *J.I. Case*,[84] supra, the Supreme Court long ago made clear that individual agreements between employers and employees may not extinguish rights under the Act. Member Johnson's attempt to distinguish these cases is unavailing. In his view, both decisions are essentially limited to their facts, prohibiting individual agreements restricting Section 7 rights only where employees had designated a union as their collective-bargaining representative or a union had been certified. There is no sound basis for reading the two decisions so narrowly. The implicit premise of such a reading is that Section 7 protects only the right to engage in collective bargaining, but the statutory text proves otherwise—as the Supreme Court in *Eastex*, supra, observed, pointing out that Congress chose "to protect concerted activities for the somewhat broader purpose of 'mutual aid

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[84] Member Johnson implies that the *D. R. Horton* Board deliberately omitted language from the Court's *J.I. Case* decision because it undercut the Board's analysis there. In fact, the language has no such effect. The Court observed that an employee was free to make "any contract provided that it is not inconsistent with a collective agreement *or does not amount to or result from or is not part of an unfair labor practice.*" 321 U.S. at 339 (emphasis added). The arbitration agreement in D. R. Horton, of course, amounted to an unfair labor practice. Nor, in any case, could it fairly be said to have been made by the employee in the sense contemplated by the Court, when it was unilaterally imposed by the employer as a term and condition of employment.

or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'"[85]

(2)

In addition to disputing the *D. R. Horton* Board's analysis of Section 7, Member Johnson rejects its accommodation of the NLRA and the Federal Arbitration Act. How those two statutes must be accommodated, of course, depends on how each is interpreted. We have explained why Member Johnson's interpretation of the NLRA is seriously mistaken, and so his view of the proper accommodation required here is also flawed. In addressing the Fifth Circuit's decision in *D. R. Horton*, we have addressed most of the points made by Member Johnson with respect to the FAA and the Supreme Court's jurisprudence under that statute. Our dissenting colleague points to no Supreme Court decision that directly answers the question posed in *D. R. Horton*. Nor does he point to any language in either the text of the FAA or its legislative history that even hints that Congress could have envisioned the result Member Johnson would reach here.

For reasons already offered, we disagree with Member Johnson's view that (1) the FAA's savings clause does not apply, even though both the NLRA and the Norris-LaGuardia Act provide grounds for revoking any private agreement that is inconsistent with those statutes; and (2) neither the NLRA nor the Norris-LaGuardia Act amounts to a "contrary Congressional command" invalidating arbitration agreements like the one at issue in *D. R. Horton*. It is

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[85] *Eastex*, supra, 437 U.S. at 565.

certainly true that the Supreme Court's decisions have construed Section 2 of the FAA to exclude particular judicially created grounds for revocation—State law unconscionability doctrine in *Concepcion* and the "effective vindication" principle applied by some Federal judges in *Italian Colors*. But here we deal not with State statutes or judge-made rules, but with the core provisions and policies of two Federal labor-law statutes. Unless the FAA is treated as a *super* "super statute," this distinction matters.[86]

Nor can we agree with Member Johnson that the principle that an arbitration agreement is invalid if it divests a party of substantive rights refers exclusively to rights "arising under the statute that gave rise to the claim"—here (in his view) the FLSA, but not the NLRA, even though the necessary and intended effect of the mandatory arbitration agreement is to defeat the exercise of Section 7 rights.[87] Member Johnson

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[86] See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 Duke L. J. 1215 (2001). The two scholars define a "super-statute" as a "law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute." Id. at 1216. They go on to identify the Norris-LaGuardia Act, the NLRA, and the FAA all as "super statutes" (see id. at 1227, 1260) and observe that when "super statutes" are in conflict, the Supreme Court "will trim back the super-statute whose policy and principle would be relatively less impaired by nonapplication." Id. at 1260. To us, it seems clear that in a case like *D. R. Horton*, it is the *FAA* that would be "relatively less impaired by nonapplication."

[87] Member Johnson insists that the Supreme Court's decision in *Italian Colors*, supra, demonstrates that the NLRA Sec. 7 right to

views the Section 7 right to engage in concerted legal activity as exceptionally narrow, but a long line of cases proves him wrong.

Member Johnson also errs in rejecting our view that Section 10(a) of the Act—which provides that a "means of adjustment . . . established by agreement" cannot affect the Board's authority—presents an obstacle to the enforcement of mandatory arbitration agreements. In arguing that Section 10(a) has no application to such agreements, because it lacks the specificity "necessary to override the FAA" and creates "no substantive right," Member Johnson misses the point. It is Section 7 that creates the relevant substantive right here, and Section 10(a) that demonstrates the intent of Congress not to permit private agreements to supersede the protections of the Act. Inasmuch as *no* individual agreement between an employer and an employee can restrict Section 7 rights—the teaching of the Supreme Court's decisions in *National Licorice* and *J.I. Case*, supra—our dissenting colleague's demand for specificity is misplaced.

Finally, Member Johnson's effort to explain why the Norris-LaGuardia Act has no bearing here falls far short. Member Johnson acknowledges the language of that statute, at once sweeping and detailed, but he fails to come to terms with it. To cite cases involving *collectively-bargained* arbitration provisions, as Mem-

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pursue legal claims concertedly cannot be a substantive right, because the Supreme Court has upheld a class-arbitration waiver in the context of Federal antitrust law. But Federal antitrust law has no provision comparable to Sec. 7. Indeed, to restate the obvious, none of the Supreme Court decisions on which Member Johnson relies addresses, even indirectly, the issue posed here.

ber Johnson does,[88] is to miss the crucial point, for reasons we have stated. And, given the language of the Norris-LaGuardia Act—which not only protects concerted activity generally, but takes care to identify a wide range of specific examples in Section 4—it is demonstrably wrong to assert that the "true focus" of the statute was limited to "strike activity." Section 13 of the statute, notably, defines "labor dispute" very broadly, to include "any controversy concerning terms and conditions of employment." 29 U.S.C. § 113. Nor is this a case where the language of the Norris-LaGuardia Act must be accommodated to the more specific provisions of another Federal labor law.[89]

Member Johnson, in turn, is mistaken when he argues that the language of the Norris-LaGuardia Act itself demonstrates its inapplicability here. As we have explained, that statute makes unenforceable "*any* undertaking or promise . . . in conflict with the public policy declared" in the Act."[90] That policy is

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[88] Member Johnson quotes a 1956 First Circuit decision stating that an "agreement to arbitrate is not one of those contracts to which the Norris-LaGuardia Act applies." *Electrical Workers Local 25 v. General Electric Co.*, 233 F.2d 85, 90 (1st Cir. 1956). But that case involved a union's effort to compel an employer to arbitrate disputes in accordance with a collective-bargaining agreement. The decision says nothing about mandatory individual arbitration agreements, imposed on workers as a condition of employment, prohibiting concerted legal activity of the sort that the Norris-LaGuardia Act expressly protected.

[89] See *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives Assn.*, 491 U.S. 490 , 513-514 (1989) (Norris-LaGuardia Act not required to yield to Interstate Commerce Act, distinguishing cases involving Railway Labor Act and NLRA).

[90] 29 U.S.C. § 103 (emphasis added).

defined as insuring that the "individual unorganized worker" is "free from the interference, restraint, or coercion of employers . . . in concerted activities for the purpose of . . . mutual aid or protection."[91] And among the activities specifically protected is "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court."[92] In the face of this language—and ignoring Section 15 of the Norris-LaGuardia Act, which *repeals* all conflicting statutes[93]—Member Johnson asserts that employees who disregard a mandatory arbitration agreement to pursue concerted legal activity are not, in fact, using "lawful means" to aid persons prosecuting a lawsuit —because they have somehow "violated" the FAA. This assertion obviously begs the question here. If the arbitration agreement violates the policy of the Norris-LaGuardia Act (as we have demonstrated), then it is unenforceable, and employees have no legal duty to comply with it. To the extent that the FAA would suggest otherwise, it would conflict with the Norris-LaGuardia Act—and so cannot survive under Section 15 of that statute.

d. Member Miscimarra's dissent

In dissent, Member Miscimarra specifically endorses Member Johnson's view that the FAA precludes the rule of *D. R. Horton*, invalidating arbitration agreements that are imposed on employees as a condition of employment and that compel them to pursue their

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[91] 29 U.S.C. § 102.

[92] 29 U.S.C. § 104.

[93] 29 U.S.C. § 115.

claims against their employer individually. We confine our response, then, to other points raised by Member Miscimarra, none of which persuade us that *D. R. Horton* was incorrectly decided.

We begin by reiterating an essential point made by the *D. R. Horton* Board and already repeated here: the NLRA does not create a right to class certification or the equivalent; rather, it creates a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint. There should be no doubt on this score, but Member Miscimarra's dissent might inadvertently cause confusion for some readers. Contrary to any suggestion in the dissent, we make no "assumption that Congress, in the NLRA, vested authority in the Board to guarantee that . . . claims [will] be afforded 'class' treatment in litigation." We do not "suggest that Congress, in 1935, incorporated into the NLRA a guarantee that non-NLRA claims will be afforded 'class' treatment." We do not hold that "Section 7 guarantee[s] class-type procedures relating to claims brought under non-NLRA statutes." This case, like *D. R. Horton*, is not about *guaranteeing* class treatment. It is about the legality of mandatory waivers of employees' right to *seek* class treatment or the equivalent for their workplace claims (where that potential exists as a matter of law) in any forum, judicial or arbitral. Such employer-imposed restraints, as we have shown here, violate the Act because they purport to preclude *all* forms of group litigation or arbitration, regardless of whether they would otherwise be available to employees. Our dissenting colleague's exposition of the many forms of group litigation that exist under American law is beside the point. Nothing

in *D. R. Horton* purports to affect those mechanisms in any way. The Board's concern is entirely with employer-imposed restraints that would preclude employees from seeking to use such mechanisms. To hold such restraints unlawful is hardly to create a "regulatory scheme" (in the dissent's words).

Member Miscimarra mistakenly argues that the proviso to Section 9(a) of the Act presents an obstacle to the holding of *D. R. Horton*. According to our colleague, "Section 9(a) of the Act explicitly protects the right of every employee as an 'individual' to 'present' and to 'adjust' grievances 'at any time.'" *D. R. Horton*, the argument continues, interferes with this "right," by preventing an individual employee from agreeing with his employer to resolve his workplace claim on an individual basis. Of course, the premise of the argument—that employees have *agreed* to pursue their claims individually—is false. Here, as in *D. R. Horton*, mandatory arbitration agreements were imposed on employees as a condition of employment by their employer. In any case, the language of Section 9(a), viewed and understood in context, and the teachings of the Supreme Court refute our colleague's position.

We start with the statutory text. Section 9(a), in its entirety, reads:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided, That any individual employee or a group*

> *of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided* further, That the bargaining representative has been given [the] opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (emphasis added in part). This is the provision of the Act that makes a duly recognized or certified union the exclusive representative of all employees in the bargaining unit. The language upon which Member Miscimarra relies comes from a proviso to this provision that permits represented employees to present grievances directly to their employer.

By its clear terms, neither Section 9(a) nor the proviso relied on by Member Miscimarra has any bearing on any issue at stake in *D. R. Horton*. We are not concerned here with the exclusive-representative status of a labor union or the ability of individual employees to "present grievances to their employer and to have such grievances adjusted" notwithstanding their union's exclusive bargaining right. As the Supreme Court explained in *Emporium Capwell*, supra, the "intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of [Section] 8(a)(5)" of the

Act.[94] Only in this very limited respect does the proviso create a "right"; indeed, the *Emporium Capwell* Court pointed out that the NLRA "nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation."[95] Moreover, the "right" is limited further because it exists largely at the sufferance of the union, which may negate it through a collective-bargaining agreement.

But even accepting Member Miscimarra's argument at face value, it proves too much. The hypothetical "right" of the 9(a) proviso is granted not only to "any individual employee," but also, expressly, to a "group of employees." The proviso, then, can hardly be said to protect an employer who, as here, seeks to preclude a

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[94] 420 U.S. at 61 (emphasis added). Sec. 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5). The issue in *Emporium Capwell* was whether the employer had lawfully discharged a group of union-represented, minority employees who had sought to bargain separately with their employer over alleged racially discriminatory practices. The Court held that Sec. 7 did not protect the employees' effort.

[95] Id. The Court went on to endorse a Second Circuit decision that "fully explicated the matter." Id., citing *Black-Clawson Co., Inc. v. Machinists Lodge 355*, 313 F.2d 179 (2d Cir. 1962). There, the Second Circuit held that Sec. 9(a) did not entitle an individual employee to compel his employer to arbitrate a grievance. "Despite Congress' use of the word 'right,'" the court observed, "which seems to import an indefeasible right mirrored in a duty on the part of the employer, . . . the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances. . . ." 313 F.2d at 185. The Sec. 9(a) proviso did not create a substantive right, the court explained, but rather carved out an exception to the rule of union exclusivity. Id.

"group of employees" from presenting and pursuing their grievances together. The Supreme Court, meanwhile, has made clear as a general matter that the 9(a) proviso is not a shield for employers who seek to circumvent other requirements of the Act, holding that the proviso does not permit an employer to deal with a company-dominated employee committee in contravention of Section 8(a)(2) of the Act.[96]

Finally, we reject our colleague's related suggestion that the Section 7 "right to refrain" from protected concerted activity is implicated here. In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D. R. Horton* does not compel *employees* to pursue their claims concertedly.

In sum, we have carefully considered, and fully addressed, the views of both the Federal appellate courts that have rejected *D. R. Horton* and the views of our dissenting colleagues. We have no illusions that our decision today will be the last word on the subject, but we believe that *D. R. Horton* was correctly decided, and we adhere to it.

2. The Respondent's Arbitration Agreements violate Section 8(a)(1)

Having reaffirmed the rationale and holding of *D. R. Horton*, we turn to the facts of this case, which is easily disposed of. Both the original and the revised arbitration agreements here are unlawful under *D. R. Horton*.

We find that the Agreement violates Section 8(a)(1) because it explicitly prohibits employees from concert-

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[96] *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 214-218 (1959).

edly pursuing employment-related claims in any forum. By virtue of the Agreement, the Respondent conditions employment on a waiver of employees' right "to commence, be a party to, or act as a class member in, any class or collective action in any court action . . . relating to employment issues," and "to commence or be a party to any group, class or collective action claim in arbitration or any other forum." The Agreement limits the resolution of all employment-related disputes to binding individual arbitration, and provides that any claim "shall be heard without consolidation of such claim with any other person or entity's claim." The Agreement thus clearly and expressly bars employees from exercising their Section 7 right to pursue collective litigation of employment-related claims in *all* forums.

The Respondent argues that the Agreement conforms to *D. R. Horton* by virtue of its exclusion of "claims which must, by statute or other law, be resolved in other forums." According to the Respondent, this exclusion provides an avenue for employees to file administrative claims with Federal agencies that have the power to seek relief on a classwide basis. Thus, the Respondent posits, the Agreement satisfies the Board's requirement in *D. R. Horton* that employers "leave[] open a judicial forum for class and collective claims" so that "employees' NLRA rights are preserved." 357 NLRB No. 184, slip op. at 12. We reject this contention.

First, the provision excluding claims that must be resolved in other forums appears in and modifies the section of the Agreement dealing with choice of forum—i.e., the selection of an arbitral forum and the

waiver of the right to a judicial forum. It does not, by its terms, modify the separate provisions waiving the right to litigate concertedly—i.e., "to commence, be a party to, or act as a class member in, any class or collective action in any court action against the other party relating to employment issues"; to "commence or be a party to any group, class or collective action claim in arbitration or any other forum"; or to consolidate one's "claim with any other person or entity's claim." Even assuming the Agreement could be read to allow administrative agencies to seek classwide relief in court on the basis of a claim filed by an employee, it still prohibits employees from "be[ing] . . . part[ies] to" or "act[ing] as . . . class member[s] in" such a case. Indeed, one could argue that the Agreement prohibits individual employees from filing administrative claims to begin with, since such a claim could be construed as having "commence[d]" a class action in the event that the agency decides to seek classwide relief. And the Agreement certainly prohibits two or more employees from filing a joint claim in "any . . . forum," including an administrative agency.

Second, this provision exempts from mandatory individual arbitration only those claims that "*must*, by statute or other law, be resolved" in forums other than arbitration (emphasis added). The Respondent provides no examples of such claims, and absent any examples, we are unconvinced that this exemption has any content whatsoever. The Supreme Court has made it abundantly clear that claims arising under a variety of laws, including Federal employment laws,

may be resolved in an arbitral forum.[97] Even unfair labor practice claims, which must be *filed* in an administrative forum, may be *resolved* in an arbitral forum. See *Collyer Insulated Wire*, 192 NLRB 837 (1971) (prearbitral deferral); *United Technologies Corp.*, 268 NLRB 557 (1984) (same); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) (postarbitral deferral); *Olin Corp.*, 268 NLRB 573 (1984) (same).[98] Moreover, the Agreement strongly suggests that claims under the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and the WARN Act are not so exempted, inasmuch as they are specifically listed as examples of claims that are subject to mandatory arbitration. Whatever claims this provision may exempt, if any, it does not countermand the plain meaning of the Agreement's broad mandatory arbitration and concerted-litigation waiver provisions.

The Revised Agreement also unlawfully interferes with the exercise of Section 7 rights.[99] While it states

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[97] See *Gilmer*, supra, 500 U.S. at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.").

[98] Because the exemption for claims that must be "resolved" in another forum does not encompass unfair labor practice claims, and because nothing else in the Agreement excludes such claims from the scope of the provisions mandating arbitration of all claims, the Agreement also violates Sec. 8(a)(1) because employees reasonably would construe it as prohibiting them from filing unfair labor practice charges with the Board.

[99] The amended complaint does not specifically allege that the Revised Agreement violates Sec. 8(a)(1). It does, however, allege that the Respondent, since July 28, 2010, has violated Sec. 8(a)(1)

that employees do not waive their Section 7 right "to file a group, class or collective action in court" and will not be disciplined or threatened with discipline if they do so, the Revised Agreement leaves intact the entirety of the original Agreement, under which employees explicitly waive their right "to commence, be a party to, or [act as a] class member [in, any class] or collective action," and "to commence or be a party to any group, class or collective action claim in arbitration or any other forum." And the Revised Agreement goes on to state that the Respondent may "seek enforcement of the group, class or collective action waiver . . . and seek dismissal of any such class or collective claims." This additional language makes clear that the Revised Agreement does not negate the Agreement's provisions waiving all rights to litigate employment-related disputes concertedly. Employees would thus reasonably read the Revised Agreement as merely stating that the Respondent will not retaliate against them if they file a class or collective action. The right "to commence, be a party to, or [act as a] class member in" the action itself remains waived.

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by maintaining and enforcing an agreement titled "Binding Arbitration Agreement and Waiver of Jury Trial." The Revised Agreement, like the Agreement, has that title. And the Respondent has maintained and enforced the Revised Agreement "since July 28, 2010," because the Revised Agreement became effective after that date on March 6, 2012. The General Counsel's arguments on brief make clear that he considers the amended complaint to challenge the lawfulness of the Revised Agreement, and the Respondent does not contest this. Consistent with the positions of the parties and language of the amended complaint, we find that the lawfulness of the Revised Agreement is properly before us.

The Respondent argues that the Revised Agreement is nonetheless lawful because it permits employees to file Board charges "addressing the enforcement" of the Agreement. The Board, however, rejected this very argument in *D. R. Horton*. See 357 NLRB No. 184, slip op. at 7. As the Board explained, such language does not cure the Agreement's restriction on exercising Section 7 rights because "[e]mployees still would reasonably believe that they were barred from filing or joining class or collective action, as the arbitration agreement . . . still expressly state[s] that they waive the right to do so." Id. At best, the language added to the Agreement in the Revised Agreement creates an ambiguity, which must be construed against the Respondent as the drafter of the Revised Agreement. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Thus, even assuming that the Revised Agreement does not expressly prohibit the exercise of Section 7 rights, it still violates Section 8(a)(1) because employees subject to the Revised Agreement would reasonably construe it as waiving their right to pursue employment-related claims concertedly in all forums. See *Lutheran Heritage Village*, supra, 343 NLRB at 647.

3. The Respondent's efforts to enforce its unlawful Agreements also violate Section 8(a)(1)

We further find that the Respondent violated Section 8(a)(1) by enforcing the Agreement through its motion to dismiss the plaintiffs' FLSA collective action and to compel them to arbitrate their claims individually. It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washing-*

ton Aluminum Co., 370 U.S. 9, 16-17 (1962); *Republic Aviation Corp.*, 324 U.S. 793 (1945). That is precisely what the Respondent did through its motion to dismiss. Moreover, the Supreme Court long ago recognized the authority of the Board to prevent an employer from benefitting from "contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act." *National Licorice Co.*, supra, 309 U.S. at 365 (enforcing Board order requiring employer to cease enforcing individual contracts under which employees waived rights under the Act). Our determination that the Respondent violated the Act by its court motion to enforce its unlawful Agreement is consistent with these principles and precedents.[100] The Respondent contends, however, that the First Amendment as construed by the Supreme Court in *BE & K Construction Co.*, 536 U.S. 516 (2002), precludes us from finding that the Respondent violated the Act by litigating its motion in court. We have carefully considered this contention in light of the important First Amendment interests at stake, and we conclude that it is unavailing.

The First Amendment protects the right to petition the Government for redress of grievances. Although by its wording this protection seems to extend only to parties in an offensive litigating posture—e.g., plaintiffs—courts have construed the First Amend-

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[100] See also *Kaiser Steel Corp. v. Mullins*, supra, 455 U.S. at 83 ("[A] federal court has a duty to determine whether a contract violates federal law before enforcing it.").

ment as extending this protection to defendants as well,[101] and we will assume likewise. To safeguard this constitutional right, the Supreme Court has held that the Board may find the filing and prosecution of an ongoing or completed lawsuit to be an unfair labor practice only if the lawsuit is both objectively baseless and subjectively motivated by an unlawful purpose—i.e., if it lacks a reasonable basis in fact or law and was prosecuted with a retaliatory motive. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) (ongoing actions); *BE & K Construction*, above (completed actions).

In *Bill Johnson's*, however, the Court carved out an exception for two situations in which a lawsuit enjoys no such First Amendment protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and, as pertinent here, where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may restrain litigation efforts that have an illegal objective, even if—like the Respondent's successful motion before the court—those efforts are "otherwise meritorious." See *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992).[102]

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[101] See *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005) (stating that "asking a court to deny one's opponent's petition is also a form of petition"); *In re Burlington Northern, Inc.*, 822 F.2d 518, 532 (5th Cir. 1987) ("We perceive no reason to apply any different [First Amendment protection] standard to defending lawsuits than to initiating them.").

[102] Contrary to the Respondent's suggestion on brief, the Court's decision in *BE & K* "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law

Under settled law, a party acts with an illegal objective when it seeks to enforce an agreement that is unlawful under the Act. For example, in *Elevator Constructors (Long Elevator)*, the Board found that a union violated Section 8(b)(4)(ii)(A) by filing a grievance "predicated on a reading . . . of the collective-bargaining agreement that would convert it into a de facto hot cargo provision, in violation of Section 8(e)." 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). The Board enjoined the union from pursuing its grievance, explaining that "[b]ecause we have concluded that the contract clause as construed by the [union] would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's*." Id.[103] Notably, the Board broadly clarified the difference between a retaliatory motive, which by itself does not remove a party from First Amendment protection, and an illegal objective of "seeking to enforce an unlawful contract provision." Id. (citing *Teamsters Local 705 v. NLRB (Emery Air Freight)*, 820 F.2d 448 (D.C. Cir. 1987)). Reviewing courts have uniformly accepted this reasoning.[104]

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to be an unfair labor practice." *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 (2011); see also *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010).

[103] See also *Longshoremen Local 1291 (Holt Cargo Systems)*, 309 NLRB 1283 (1992); *Service Employees Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB 392 (1993), enfd. in relevant part 68 F.3d 490 (D.C. Cir. 1995); *Iron Workers (Southwestern Materials)*, 328 NLRB 934 (1999).

[104] See *NLRB v. Local 1131*, 777 F.2d 1131, 1141 (6th Cir. 1985) ("[W]here, as here, the object of the grievance is to enforce an

So also, as the Court recognized in *Bill Johnson's*, the Board may find unlawful under the Act, without impinging on the First Amendment, union lawsuits to collect fines imposed on employees who crossed a picket line after resigning from the union. The Court observed that it had previously enforced Board orders in such cases.[105] As the Court explained in *Bill Johnson's*, such lawsuits have an illegal objective because they seek "enforcement of fines that could not lawfully be imposed under the Act." 461 U.S. at 737 fn. 5.

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illegal contractual provision, the Board is fully empowered to enjoin the party from pursuing the grievance."); *Nelson v. Electrical Workers Local 46*, 899 F.2d 1557, 1562-1563 (9th Cir. 1990) (finding that because there were "substantial grounds to believe the Agreement, as construed by the Union, violates section 8(e), *Bill Johnson's* does not preclude the Board or the court from enjoining the Union's attempts to enforce the contract"); *Local 32B-32J v. NLRB*, 68 F.3d 490, 495-496 (D.C. Cir. 1995) (finding that union's pursuit of arbitration had an illegal objective "from the start" because its sole purpose was to enforce the union's interpretation of a contract that would "necessarily result in an illegal hot cargo agreement").

[105] See 461 U.S. at 737 fn. 5 (citing *Booster Lodge No. 405, IAM (Boeing Co.)*, 185 NLRB 380 (1970), enfd. in relevant part 459 F.2d 1143 (D.C. Cir. 1972), affd. 412 U.S. 84 (1973); and *Granite State Joint Board*, 187 NLRB 636 (1970), enf. denied 446 F.2d 369 (1st Cir. 1971), revd. 409 U.S. 213 (1972)). In *Booster Lodge*, the Board found that a union's postresignation fines unlawfully restrained employees in the exercise of their Sec. 7 right to refrain from concerted activities because the fines were "inherently coercive" and "calculated to force an individual both to pay money and to engage in particular conduct against his will." 185 NLRB at 381-382. Subsequently, in *Granite State Joint Board*, the Board found that a union violated Sec. 8(b)(1)(A) when it sought to enforce unlawful fines in state court. 187 NLRB at 636, 643. The Board ordered that union to take "all necessary action" in the State court "to withdraw and give up all claims for said fines." Id. at 637, 645.

Thus, litigation has an illegal objective and may properly be found to violate the Act where it is "simply an attempt to enforce an underlying act that is itself an unfair labor practice." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001).

Consistent with this analysis, we find that the Respondent acted with an illegal objective when it moved to compel arbitration of the plaintiffs' FLSA claims and to dismiss their collective action, and when it continued to maintain that position in subsequent court filings, to enforce an underlying act—the Agreement—that is itself an unfair labor practice. This motion had the illegal objective of "seeking to enforce an unlawful contract provision." See *Long Elevator*, 289 NLRB at 1095. And, like the union fine litigation condemned by the Court in *Granite State Joint Board* and *Bill Johnson's*, the motion was an attempt to enforce an agreement that interfered with employees' exercise of their Section 7 rights and thus "could not lawfully be imposed under the Act." *Bill Johnson's*, 461 U.S. at 737 fn. 5. Accordingly, our finding that the Respondent violated Section 8(a)(1) by maintaining its motion is fully consistent with the principles established in *Bill Johnson's* and *BE & K*.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement that employees reasonably would believe bars them from filing charges with the National Labor Relations Board, and by maintaining and/or enforcing a mandatory arbitration agreement under which employ-

ees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest,[106] incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration. See *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). We shall also order the Respondent to rescind or revise the Agreement and Revised Agreement, to

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[106] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

notify employees and the district court that it has done so, and to inform the district court that it no longer opposes the plaintiffs' claims on the basis of the Agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Murphy Oil USA, Inc., Calera, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Binding Arbitration Agreement and Waiver of Jury Trial (Agreement and Waiver) in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement and Waiver does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees'

right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign the Agreement and Waiver in any form that the Agreement and Waiver has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States District Court for the Northern District of Alabama that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss Sheila Hobson's and her coplaintiffs' FLSA collective action and to compel arbitration of their claims, and inform the court that it no longer opposes the plaintiffs' FLSA action on the basis of those agreements.

(d) In the manner set forth in the remedy section of this decision, reimburse the plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss their wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Calera, Alabama facility copies of the attached notice marked "Appendix A" and at all other facilities nationwide copies of the attached notice marked "Appendix B."[107] Copies of the notice, on forms provided by the Regional Director for Region 10, after being

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[107] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since July 28, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. Oct. 28, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

The English poet John Donne wrote that "[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the main."[1] So too is the National Labor Relations Act (NLRA or the Act). The NLRA coexists with a broad array of other Federal statutes, in addition to State and local laws. In today's decision, my colleagues treat our statute as the protector of "class" action procedures under all laws, everywhere. However, it does no disrespect to the Act to recognize its reasonable limitations.

When adopting the NLRA, Congress intended to protect employees from retaliation for engaging in certain concerted activities for mutual aid and protection. This can include protection against retaliation based on concerted activities that relate to non-NLRA claims or complaints against an employer or union.[2] Yet, I believe Congress did not vest the NLRB with authority to dictate what internal *procedures* must govern *non*-NLRA claims adjudicated by courts and agencies *other than* the NLRB. Nor can it be correct to suggest that the NLRA in this area "trumps

[1] John Donne, Meditation XVII from *Devotions Upon Emergent Occasions, and severall steps in my Sicknes* (1624).

[2] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

all other Federal statutes."[3] The Act cannot reasonably be interpreted as giving employees a broad-based right to "class" treatment under *other* Federal, State, and local laws. Indeed, as noted below, most of these other laws—and the modern treatment of "class" litigation—did not even exist until long after the NLRA was enacted. And one can hardly attribute to Congress a decision, as part of the NLRA, to protect "class" litigation under all kinds of other laws when those other laws—even at present—do not attach a common meaning to what constitutes "class" litigation.

As indicated in part A below, I agree with the majority that the NLRA affords protection to two or more employees who, while acting in concert, initiate or participate in one or more non-NLRA legal claims for the purpose of mutual aid or protection.[4] However, I respectfully dissent from the majority's finding here—and I disagree with the Board's holding in *D. R. Horton*[5]—that Section 8(a)(1) of the Act prohibits employees and employers from entering into agreements that waive "class" procedures in litigation or arbitration.

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[3] *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1501 (2000), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003)

[4] I also agree with the majority's finding that—separate from the "class" waiver contained in Respondent's arbitration agreement—the original agreement violated Sec. 8(a)(1) by indicating that disputes arising under the NLRA, instead of being the subject of charges resolved by the Board, had to be resolved in mandatory arbitration.

[5] 357 NLRB No. 184 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013).

Four considerations warrant a conclusion, in my view, that the Act does not prohibit or contemplate any particular treatment of "class" procedures and waivers relating to non-NLRA claims.

First, as indicated in part B below, nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how *other* courts or *other* agencies would adjudicate non-NLRA legal claims, whether as "class actions," "collective actions," the "joinder" of individual claims, or otherwise. Rather, Congress clearly contemplated that such procedural details would be adjudicated in accordance with procedures prescribed in non-NLRA statutes, supplemented by procedural rules authorized or adopted by Congress, State legislatures, and the courts and agencies charged with enforcing non-NLRA claims.[6] Because the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudications, I believe the Board lacks authority to conclude that "class" waivers constitute unlawful restraint, coercion, or interference in violation of Section 8(a)(1).

Second, Section 9(a) protects the right of employees and employers "at any time" to adjust "grievances" on an "individual" basis.[7] Therefore, as indicated in part C below, I believe Section 9(a) protects the right of individual employees and their employer to enter into

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[6] In the remainder of this opinion, the following abbreviations are used: Federal Rules of Civil Procedure (FRCP or Federal Rules), Equal Employment Opportunity Commission (EEOC); the Fair Labor Standards Act (FLSA); and Title VII of the Civil Rights Act of 1964 (Title VII).

[7] Sec. 9(a) (emphasis added).

a "class" waiver agreement and other agreements to adjust claims on an "individual" basis.

Third, as described in the separate dissenting opinion by Board Member Johnson, it is likewise clear that the Act does not prohibit "class" waivers in employment agreements providing for the arbitration of non-NLRA legal claims consistent with the Federal Arbitration Act (FAA). As to this issue, among others, I agree with Member Johnson's dissenting opinion and the dozens of court cases that have refused to apply *D. R. Horton*, supra.

Fourth, as indicated in part E below, I believe the Act and its legislative history render inappropriate the remedies ordered by the Board here, especially the required payment of attorneys' fees incurred by the Charging Party in opposing Respondent's meritorious motion to dismiss, which the district court granted.

Discussion

A. The NLRA Protects Concerted Employee Activities for Mutual Aid or Protection that Relate to the Pursuit of Non-NLRA Legal Claims

This case turns on the interpretation of Section 8(a)(1) and Section 7 of the Act. Section 8(a)(1) states it is unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In relevant part, Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection.[8]

The scope of Section 7 was discussed at length in our recent decision in *Fresh & Easy Neighborhood Market*.[9] On its face, Section 7 contains "words of limitation." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring). Statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases.[10]

Section 7 enumerates three specific types of protected employee activity: "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively through representatives." It then enumerates a fourth category, encompassing "other *concerted* activities for the *purpose* of collective bargaining or *other mutual aid or protection*." The first three enumerated types of protected activity—"self-organization," "to form, join, or assist labor organizations," and "to bargain collectively"—shed some light on the meaning of "other concerted activities for

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[8] Sec. 7 (emphasis added).

[9] 361 NLRB No. 12 (2014) (*Fresh & Easy*). In *Fresh & Easy*, I authored a partial dissenting opinion based on my view that the record did not support a conclusion that the employee there engaged in protected Sec. 7 activity (by insisting that two coemployees, over their objection, sign a paper that did nothing more than reproduce a profane message that had been written on a whiteboard). However, I agreed with the broad proposition that protected activity under Sec. 7 could arise from "concerted" activities by two or more employees in relation to a single employee's pursuit of his or her individual non-NLRA claim against the employer.

[10] 2A Norman J. Singer, *Statutes and Statutory Construction (Sutherland Statutory Construction)* Sec. 47.16 (5th ed. 1992).

the purpose of . . . other mutual aid or protection."[11] As the Supreme Court observed in *Eastex v. NLRB*,[12] Section 7 was designed "to protect concerted activities for the *somewhat* broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'"[13]

The Supreme Court held in *Eastex* that the protection afforded to concerted activities undertaken for mutual aid or protection is not lost when employees resort to "channels outside the immediate employee-employer relationship." Id. at 565. In *Eastex*, employees sought to distribute a newsletter dealing with the State's right-to-work law and minimum wage legislation. Upholding the Board's determination that distribution of the newsletter was protected under the Act, the Supreme Court explained:

> [I]t has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers *when they seek to improve working conditions through resort to administrative and judicial forums*. . . . To hold that activity of this nature is entirely unprotected—irrespective of location or the

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[11] See, e.g., *Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1191-1192 (D.C. Cir. 2000) ("[T]he canon of *ejusdem generis* . . . counsels against our reading [a] general phrase to include conduct wholly unlike that specified in the immediately preceding list. . . .").

[12] 437 U.S. at 565 (emphasis added).

[13] Sec. 7 also protects the right of employees to "refrain from any or all" of the activities described in the statutory language. In my view, this protected right to "refrain" from protected activity bears on the right of individual employees to enter into agreements with their employers providing for the resolution of claims and disputes on an "individual" basis, which is described in part C below.

means employed—would leave employees open to retaliation for much legitimate activity that could improve their lot as employees.[14]

Again, in *Eastex* the Supreme Court, citing Board and court decisions, stated it was protected for em-

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[14] Id. at 565 (fns. omitted), citing *Walls Mfg. Co.*, 137 NLRB 1317, 1319 (1962), enfd. 321 F.2d 753 (D.C. Cir. 1963), cert. denied 375 U.S. 923 (1963) (employee's discharge in retaliation for letter to "State regulatory agency"—the state health department—complaining about unsanitary conditions violated Sec. 8(a)(1)); *Socony Mobil Oil Co.*, 153 NLRB 1244, 1245, 1248 (1965), enfd. 357 F.2d 662 (2d Cir. 1966) (employee suspension in retaliation for alleged insolent and insubordinate behavior "during the Coast Guard investigation aboard ship" and "complaint to the Coast Guard" violated Sec. 8(a)(1)); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (two employee discharges based on alleged failure to read affidavits filed in union's State court injunction proceeding violated Sec. 8(a)(1); court finds that "filing by employees of a labor related civil action is protected activity under section 7"), enfg. 223 NLRB 696 (1976); *Wray Electric Contracting, Inc.*, 210 NLRB 757, 761 (1974) (employee discharge for filing "a complaint with OSHA" on behalf of union violated Sec. 8(a)(3) and (1)); *King Soopers, Inc.*, 222 NLRB 1011, 1018 (1976) (employee discharge in retaliation for employee's filing of "civil rights charges" with EEOC and state EEO agency violated Sec. 8(a)(1)); *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354, 1357 (1976) (employee discharge in retaliation for union activity and "soliciting the aid of the Wage and Hour Division" of the U.S. Dept. of Labor violated Sec. 8(a)(3) and (1)); *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (employee discharge in retaliation for employee's filing of "letter of complaint to the California OSHA office" violated Sec. 8(a)(1)). The Board's decision in *Alleluia Cushion*—where an employee's conduct was deemed "concerted" even though pursued based on a concern about his own safety—was overruled in *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985).

ployees to "resort" to other agencies and courts as part of their concerted activities for mutual aid or protection.[15] In each of the cited examples where resort to an agency or court regarding a non-NLRA claim or complaint was protected, the cases focused on protecting employees from *retaliation* for *initiating or participating in* the proceeding. None of the cases dealt—even remotely—with the internal procedures applicable to the non-NLRA claims or complaints associated with the employee activities.[16] This is consistent with the Supreme Court's statement, noted above, that "mutual aid or protection" expanded Section 7 protection only "somewhat" beyond the particular concerted activities enumerated in Section 7—i.e., self-organization, creating and supporting unions, and collective bargaining.

Applying these principles, I agree that a broad range of "concerted" activities are protected under Section 7, if undertaken by two or more employees for "mutual aid or protection," even though they may involve non-NLRA legal claims. For example, Section 8(a)(1) and (b)(1)(A) prohibit retaliation if two or more employees—for mutual aid or protection—engage in concerted activities that involve:

- initiating or participating in non-NLRA employment-related agency charges or complaints;[17]

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[15] 437 U.S. at 565.

[16] See the case descriptions set forth in fn. 14, supra.

[17] See, e.g., *Walls Mfg. Co.*, *Socony Mobil Oil Co.*, *Wray Electric Contracting, Inc.*, and *Triangle Tool & Engineering, Inc.*, described in fn. 14, supra.

- initiating or participating in non-NLRA employment-related claims filed in Federal, State or local courts;[18]
- meeting with one another to identify witnesses, facts, documents, and other evidence supporting non-NLRA employment-related charges or claims;[19]
- engaging in work stoppages (if not prohibited by a no-strike commitment in a collective-bargaining agreement) or otherwise expressing solidarity and mutual support for non-NLRA employment-related charges or claims;[20]
- meeting with the same attorney(s) who represent employees in non-NLRA employment-related agency or court cases;[21]

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[18] See, e.g., *Altex Ready Mixed Concrete Corp. v. NLRB*, described in fn. 14, supra.

[19] *Sarkes Tarzian, Inc.*, 149 NLRB 147, 149, 153 (1964) (three employees met with union attorney to discuss filing of libel action against employer); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853-854 (1952) (discussion and circulation of a petition designating employee as other employees' agent in an FLSA suit for wages was protected, concerted activity and discharge of petition circulator violated the Act), enfd. 206 F.2d 325 (9th Cir. 1953).

[20] *Salt River Valley Water Users Assn.*, above.

[21] *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-950 (1942) (three employees jointly consulted attorney regarding FLSA claims and thereafter jointly filed FLSA suit against employer; suit constituted concerted activity protected by the Act and discharge of employees for filing suit violated the Act); *Sarkes Tarzian, Inc.*, above (employees jointly consulted attorney regarding claims against employer).

- publicizing and/or raising funds or public awareness regarding non-NLRA employment-related agency or court cases.[22]

Significantly, in each of the above cases, the existence or absence of Section 7 protection did *not* depend on whether the non-NLRA claim or complaint was pursued as a "class" action. Rather, if Section 7's statutory requirements are present—i.e., "concerted" activities for the "purpose" of "mutual aid or protection"[23]—the Act prohibits retaliation without regard to whether the non-NLRA legal matters are handled, procedurally, as a class action, a collective action, through joinder of individual claims, or as an individual claim.[24]

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[22] *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB No. 63 (2014) (emails publicizing litigation against employer); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980) (employee circulated a petition among employees to join a class action suit alleging violations of a State rest period law, collected money from his fellow employees for the retainer fee, and thereafter kept them informed of the progress of the suit, which was filed with 13 employees named as plaintiffs), enfd. 677 F.2d 421 (6th Cir. 1982).

[23] The presence or absence of protected activity turns on whether Sec. 7's statutory requirements are present—i.e., is there "concerted" activity by two or more employees engaged in for (i) self-organization, (ii) forming, joining, or assisting labor organizations, (iii) collective bargaining, or (iv) the "purpose" of "other mutual aid or protection." See *Fresh & Easy*, 361 NLRB No. 12, slip op. at 13 (Member Miscimarra, dissenting in part).

[24] The Board recognized in *Fresh & Easy*, 361 NLRB No, 12, slip op. at 3-6, that pursuit of an *individual* claim or complaint by a *single* employee can still give rise to "concerted" activity by two or more employees for the "purpose" of "mutual aid or protection" sufficient to trigger Sec. 7 protection. However, as expressed in

Conversely, the mere existence of a non-NLRA legal claim or complaint—or the involvement of two or more employees in some of the above activities—does not necessarily mean the employees are engaged in "concerted" activity, nor does it necessarily establish the "purpose" of "mutual aid or protection." Many non-NLRA employment discrimination claims or complaints—brought under Title VII or the Age Discrimination in Employment Act (ADEA), for example—may involve no "relation to group action in the interest of the employees." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Therefore, even though coemployees may be witnesses or have other involvement in a non-NLRA legal proceeding,[25] Section 7 protection is not implicated unless the evidence proves, first, the presence of "concerted" activity—i.e. activity "looking toward" some type of "group action"—and second, a "purpose" of "mu-

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my partial dissent in *Fresh & Easy*, supra, slip op. at 14-19, I believe this must be proven based on the facts presented in each case.

[25] Coemployees will often be potential witnesses in a single employee's employment-related legal dispute involving non-NLRA claims. However, the mere involvement of coemployees who witness one or more events in the workplace does not establish the existence of protected concerted activity under Sec. 7. Even if a coemployee appears as a witness in an employment-related legal proceeding, one cannot predict in advance whether the coemployee's participation would support or undermine the coemployee's claim, and it is equally unclear whether their testimony might be sought or relied upon by the employer, the union, or a fellow employee. In all cases, therefore, the presence or absence of Sec. 7 protection turns on whether the statutory requirements set forth in Sec. 7 are proven (i.e., "concerted" activity looking towards some type of "group action," with an underlying "purpose" of "mutual aid or protection"). The Act's protection cannot be inferred from the mere involvement of two or more coemployees in a non-NLRA proceeding.

tual aid or protection." Id.; see generally *Meyers I*, supra; *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

B. The NLRA does not Protect or Restrict—or Vest Authority in the Board to Dictate or Guarantee—Non-NLRA Procedures Regarding how Other Courts or Other Agencies will Adjudicate Non-NLRA Legal Claims

As noted above (and as we reaffirmed in *Fresh & Easy*), Section 7 protection may arise from "concerted" actions by two or more employees for mutual aid or protection, even if those actions relate to a claim *litigated or pursued on an individual basis*. So "class" litigation is not *necessary* to Section 7 protection.

Nor is "class" litigation, by itself, *sufficient* to establish protected Section 7 conduct. The essence of "class" litigation is that the litigation binds *nonparticipating* parties. Thus, the class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) ("Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes."). By comparison, Section 7 protection arises only when two or more employees "*engage in*" activities that are "concerted" and have the purpose of "mutual aid or

protection."[26] *Meyers I* and *Meyers II*, supra. If anything, the pursuit of similar claims by employee- litigants in separate cases, and the "joinder" of individual claims in a single case,[27] are both more likely to involve protected Section 7 conduct than "class" litigation because the former scenarios, unlike "class" litigation, necessarily involve *multiple* employees *engaged in* activities having common or similar objectives.[28]

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[26] Sec. 7 also protects the right of employees to "refrain from" engaging in activities that would otherwise be protected under the Act.

[27] The term *joinder* refers to having multiple parties or claims combined in the same case. See FRCP 18-21. Under the FRCP, the "joinder" of multiple parties may in some cases be required. FRCP 19 ("Required Joinder of Parties"). The Federal rules clearly favor "joinder"—where multiple parties all participate actively in the litigation—over "class litigation," reflected in the fact that Rule 23(a)(1) states "class" treatment will be permitted only if, in addition to other prerequisites, the court finds that "the class is so numerous that joinder of all members is impracticable."

[28] I respectfully disagree with the statement in *D. R. Horton* that "[c]learly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." 357 NLRB No. 184, slip op. at 3. When an individual files a class or collective action, there is no involvement by *any* other employees, the act of filing does not constitute an *appeal* to other employees, there is no assurance that other employees will *participate* in the matter (indeed, the point of class action litigation is to bind nonparticipants), and there is no certainty that the court or other adjudicator will find that "class" or "collective" treatment is appropriate. For these reasons, it is unsurprising that this statement in *D. R. Horton* is unaccompanied by legal citation. Sec. 7 on its face and controlling Board precedent make clear that the Act's protection is triggered only where the evidence proves that "concerted" activities—defined as conduct

I believe my colleagues in the majority—like the Board in *D. R. Horton*—mistakenly conflate "class" litigation with Section 7 protected activity. For the reasons noted above, however, the filing of a "class" action complaint by a single employee does not inherently involve protected concerted activity. And if multiple employees have the same or similar non-NLRA claims against an employer, my colleagues are mistaken in their assumption that Congress, in the NLRA, vested authority in the Board to guarantee that the claims would be afforded "class" treatment in litigation.

In my view, several considerations warrant a conclusion—contrary to the findings of the majority here and to *D. R. Horton*—that Congress in the Act did not intend to protect or prohibit any procedures by which *non*-NLRA legal claims would be adjudicated by courts or other agencies and tribunals.

First, as illustrated in part A above, Section 7 protects employees who, in pursuit of a non-NLRA legal claim, engage in "concerted" activity with the "purpose" of mutual aid or protection, *regardless* of whether the matter, procedurally, is afforded "class" or other treatment by the State, Federal, or local court or agency. Here, one need look no further than the Supreme Court's *Eastex* decision, which stated that,

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that, at the least, looks toward "*group* action"—is being undertaken for the "purpose" of "*mutual* aid or protection." *Meyers I* and *Meyers II*, supra; *Mushroom Transportation Co. v. NLRB*, 330 F.2d at 685. In my view, the filing of a legal claim or complaint by a single employee—regardless of what procedural treatment the person may desire—does not instantly convert the endeavor into "concerted" or "group" action, nor does it necessarily establish a "purpose" of "mutual aid or protection" by and between multiple employees.

among the types of concerted employee activities potentially protected under Section 7, was a "resort to administrative and judicial forums," and the Court made no reference to the procedures that might govern any non-NLRA employment claims or complaints. It is significant, in this regard, that *none* of the Board and court cases cited by the Court involved "class" litigation or "class" claims. See footnote 14, supra.

Second, it defies reason to suggest that Congress, in 1935, incorporated into the NLRA a guarantee that non-NLRA claims will be afforded "class" treatment when there was no uniformity then—nor is there now—regarding what "class" treatment even means. The majority cites *D. R. Horton*, supra, for the proposition that Section 7 confers a "right to litigate . . . employment-related claims concertedly on a *joint, class*, or *collective* basis" (emphasis added), but these terms have very different meanings. In *D. R. Horton*, the Board conceded: "Depending on the applicable class or collective action procedures, of course, a *collective* claim or *class action* may be filed in the name of *multiple employee-plaintiffs* or a *single employee-plaintiff*, with other class members *sometimes being required to opt in* or *having the right to opt out of the class later*." 357 NLRB No. 184, slip op. at 3 (emphasis added). Even this description grossly oversimplifies the variation among different ways that non-NLRA multiple-party claims *might* be litigated in one or more related proceedings:

- Under FRCP Rule 23, a single class "member" may sue on behalf of all other class members and, if a Rule 23 class is certified, the *non-participating members who do nothing will be*

bound by the results of the litigation, unless they affirmatively request "exclusion." FRCP Rule 23(c)(2)(B)(v), 23(c)(3)(A), (B). Requesting exclusion is commonly referred to as "opting out" of the class.

- As the majority notes in the instant case, other types of non-NLRA "collective" claims—for example, those involving alleged Fair Labor Standards Act (FLSA) violations like those alleged by the charging party, Sheila M. Hobson (Hobson)—*bind nonparticipating class members only if they "opt in" to the class.*
- Under the Federal Rules, the preferred alternative to class treatment is to have a "joinder" of all parties, who remain responsible for litigating their respective claims in a single proceeding.[29]
- In many non-NLRA cases, class-type treatment may be available for purposes of discovery, but may be deemed inappropriate during the trial or other stages of litigation.[30]
- In other non-NLRA cases, the claims of multiple parties—treated separately during discovery or other stages—may be certified for class-

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[29] As noted above, a prerequisite to class treatment under FRCP Rule 23(a)(1) is a finding that the "joinder" of multiple parties is impracticable. See fn. 27, supra.

[30] The Federal Rules provide that, in "appropriate" cases, "an action may be brought or maintained as a class action with respect to particular issues." FRCP Rule 23(c)(4).

type treatment *solely* for purpose of trial or settlement.[31]

- Some cases involve bifurcated proceedings resulting in separate adjudications of the issues of liability and damages, respectively, with class-type treatment regarding one issue and not the other, or both.[32]
- In yet other non-NLRA cases involving multiple claims or parties, one resolution may be deemed controlling in other proceedings based on the doctrines of res judicata, collateral estoppel, claim preclusion, or issue preclusion.[33]

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[31] See, e.g., *Daniel v. Quail International, Inc.*, 2010 WL 55941, at *1 (M.D. Ga. 2010) (in FLSA collective claim involving 36 opt-in plaintiffs, the court conditionally certified the plaintiffs as a class, pending individualized discovery to determine whether each plaintiff was similarly situated with the others within the meaning of the FLSA); *Coldiron v. Pizza Hut, Inc.*, 2004 WL 2601180, at *2 (C.D. Cal. 2004) (granting motion to compel individualized discovery of 306 opt-in plaintiffs).

[32] "[C]ourts often bifurcate trials into liability and damages phases, severing common liability questions from individual damages issues." 5 James Wm. Moore et al., Moore's Federal Practice ¶ 23.45(2)(a) (3d ed. 1997). See, e.g., *Arthur Young & Co. v. U.S. District Court*, 549 F.2d 686, 697 (9th Cir. 1977) (affirming district court's decision "to separate the individual damage issues from trial of the class issues"); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534-535 (N.D. Ga. 1972) ("If liability is established, other issues, including damages, can be handled later, perhaps on a class member-by-class member basis.").

[33] See, e.g., *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar

- The above examples involve non-NLRA cases adjudicated in federal courts under the Federal Rules. Even more varied rules and procedures regarding class-type treatment are prescribed, with equally diverse requirements and prerequisites, under non-NLRA State and local laws.[34]

The above examples are far from exhaustive, but they demonstrate that different parties can pursue the same or similar claims in a near-endless variety of ways. When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of one or more of the above procedures regarding litigation of employees' *non*-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history. One would also expect there to be guidance as to which class-type procedures, regarding what stages, of non-NLRA litigation are guaranteed. However, the Act and its legislative history are completely silent as to these issues. Section 8(a)(1) and (b)(1)(A) merely prohibit restraint and coercion regarding "rights guaranteed in section 7." And Sec-

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or claim preclusion) and collateral estoppel (issue preclusion) apply" (citations omitted); *Soudel v. Northwest Airlines, Inc.*, 56 F.3d 934, 938-939 (8th Cir. 1995) (State court judgment against plaintiffs barred them from pursuing a parallel Title VII class claim); *Bailey v. DiMarzio*, 925 F. Supp. 801, 810-811 (D.D.C. 1995) (court-approved class action settlement precluded plaintiffs' subsequent Federal discrimination claim).

[34] State and local courts and agencies often apply procedural rules that are similar to the Federal rules. However, there is considerable diversity as to particular details, especially in their case-by-case application. Moreover, as noted in the text, all non-NLRA claims are governed by procedures that are very different from the procedures that govern the Board's own proceedings.

tion 7 confers protection triggered by "concerted" activity for the "purpose" of "mutual aid or protection," which (as noted in part A above) may arise from non-NLRA claims and complaints *regardless of whether or not class-type procedures are applicable.*

Third, it is no surprise that Congress adopted the NLRA without mentioning or prescribing any particular procedures regarding the class-type treatment of non-NLRA claims. As the Court of Appeals for the Fifth Circuit observed when rejecting the Board's holding in *D. R. Horton*, "modern class action practice" did not originate until substantial revisions were made to FRCP Rule 23 in 1966, more than three decades after the NLRA's adoption in 1935. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-833 (1999) ("[M]odern class action practice emerged in the 1966 revision of Rule 23."). Likewise, many of our most important non-NLRA employment statutes—for example, Title VII, the ADEA, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA), among others—were not adopted by Congress until the mid-1960s and later.

Fourth, if Section 7 guaranteed class-type procedures relating to claims brought under *non*-NLRA statutes, this would produce an array of incongruities that could not reasonably have been intended by Congress. The NLRA was designed to create a "single, uniform, national rule" displacing the "variegated laws of the several States,"[35] producing the "uniform appli-

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[35] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959); see also *Garner v. Teamsters Local 776*, 346 U.S. 485, 490 (1953) (NLRA reflects a view that "centralized administration

cation of its substantive rules and . . . avoid[ing] . . . diversities and conflicts likely to result from a variety of local procedures and attitudes."[36] By comparison, as noted above, there is a near-endless variety of class-type procedures, their potential availability varies depending on the type of claim and the forum in which it is adjudicated,[37] and extensive proceedings are necessary to determine whether class-type treatment is even appropriate in a given case.[38] Such in-

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of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies"); *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 149-150 (1976) (holding that States and the NLRB cannot regulate peaceful employee action not addressed in the NLRA). See generally Robert A. Gorman & Matthew W. Finkin, Basic Text On Labor Law: Unionization and Collective Bargaining 1078-1110 (2d ed. 2004).

[36] *Garner v. Teamsters Local 776*, 346 U.S. at 490.

[37] For example, Rule 23 "opt-out" class proceedings are potentially available under Title VII, which pertains to sex, race, national origin, and religious discrimination claims, among others. By comparison, "collective action" FLSA claims—if deemed appropriate—involve "opt-in" notification by employee-claimants, but many courts have held there is no substantive right to proceed collectively under the *FLSA*. *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 357-358 (citing *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); *Knehmer v. Dickinson & Co.*, 84 F.3d 316, 319-320 (9th Cir. 1996)). No substantive right to class procedures has been deemed to exist under the ADEA, even though the statute provides for class procedures. *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 357 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

[38] Again, the Supreme Court has recognized that "class" treatment—even in arbitration—necessitates "additional and dif-

herent uncertainty and variation regarding class-type treatment—if incorporated into the NLRA—would *preclude* any "single, uniform, national rule."[39] Similarly, the existence or absence of class-type "protection" would necessarily involve "diversities and conflicts" of a type of that Congress adopted the Act to prevent.[40] Moreover, the majority here—like the Board in *D. R. Horton*—not only adopts an interpretation of the Act that relates to *non*-NLRA claims, the class-type procedures applied by Federal courts are inapplicable to the Board's own proceedings.[41] The Board has no special competence regarding class-type pro-

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ferent procedures" and involves "higher stakes" because the adjudication is binding on "absent parties," and this "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, supra, 131 S. Ct. at 1750-1751. The Court also indicated that questions about the appropriateness of class-type treatment require independent consideration. Id. ("[B]efore an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.").

[39] *San Diego Building Trades Council v. Garmon*, 359 U.S. at 239.

[40] *Garner v. Teamsters Local 776*, 346 U.S. at 490.

[41] NLRB proceedings are governed by the Board's own Rules and Regulations—not the Federal Rules—and many procedural requirements for representation and unfair labor practice proceedings are set forth in the Act itself. See Sec. 3(b) (regarding representation proceedings delegated to Regional Directors subject to requests for Board review), 4(a) (handling of hearings and drafting of opinions), 6 (authorizing the Board to adopt rules and regulations as necessary to carry out the provisions of the Act), 9 (requirements applicable to representation hearings), and 10 (requirements applicable to unfair labor practice proceedings).

cedures, and our determinations in this area almost certainly would not be afforded deference.[42]

Finally, I believe it is unreasonable to suggest that Congress authorized the NLRB, based on a "guarantee" supposedly incorporated into Section 7, to intercede and invalidate *every* "class" waiver agreement governing non-NLRA rights when (i) class-type treatment is not even available under some non-NLRA statutes, (ii) class-type treatment, even if potentially available, would be denied in many cases based on their particular facts,[43] (iii) the Board's invalidation of "class" waivers would be redundant if the non-NLRA court or agency would likewise have invalidated the waiver, (iv) the Board's invalidation of other "class"

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[42] To say that courts would almost certainly not give deference to the Board's determinations in this area would be an understatement. As described in Member Johnson's separate opinion in the instant case, the Board's reasoning in *D. R. Horton*—which is the basis for the majority's decision here—has been rejected, nearly without exception, by dozens of courts.

[43] Parties devote substantial resources to litigating *whether* class certification, "collective" claims and the joinder of multiple parties in a single proceeding are appropriate (to cite just three examples), and courts often find they are not. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, supra (Supreme Court overturns certification of class of current and former female employees allegedly discriminated against based on sex in violation of Title VII); *Myers v. Hertz Corp.*, 624 F.3d 537, 547-553 (2d Cir. 2010) (affirming district court's denial of employee's motion to certify an opt-in collective action on her FLSA claim, where it was not shown that "common questions would predominate over individual ones"); *Edwards-Bennett v. H. Lee Moffitt Cancer & Research Institute, Inc.*, 2013 WL 3197041 (M.D. Fla. 2013) (denying employees' request for joinder of their race discrimination claims where "the sets of facts undergirding each claim [were] mutually exclusive"). See also fn. 38, supra.

waivers would be contrary to those courts or agencies that would give effect to such waivers, (v) the Board's invalidation of "class" waivers can effectively be undone, in every case, by any individual's election either to "opt out" (as to a FRCP Rule 23 opt-out class) or not to opt in (as to an FLSA collective action), and (vi) non-NLRA laws obviously have *their own* enforcement machinery authorized or approved by Congress or, in the case of state or local laws, by other legislative bodies, and the courts and agencies responsible for enforcing these laws have their own procedural rules.

The instant case vividly demonstrates the unworkable nature of the regulatory scheme contemplated by my colleagues in the majority. First, the majority finds Respondent violated the NLRA by filing a *meritorious* motion that *the district court granted* pursuant to the FAA, a statute that confers jurisdiction on the court, *not* the NLRB. Second, the majority likewise orders Respondent to pay the plaintiffs' attorneys fees regarding an issue as to which *the plaintiffs lost* and *the Respondent prevailed.*[44] Third, existing case law demonstrates that *other* employers and employees litigate similar disputes regarding "class" waiver agreements in countless non-NLRA court actions throughout the country, and many courts are likely to enforce such waiver agreements. The Board cannot impose a "single, uniform, national rule"[45] regarding these is-

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[44] I believe the majority's award of attorneys' fees here presents independent problems that render such an award inappropriate. See part D below.

[45] *San Diego Building Trades Council v. Garmon*, 359 U.S. at 239.

sues unless there is a parallel NLRB proceeding, pertaining to *every* case in which a "class" waiver is enforced, so the Board can adjudicate and impose in these other cases the same remedies being formulated here.

Only one thing in such a scenario is certain: it could never happen. The Board cannot exercise jurisdiction over any dispute unless a charge is filed, and many litigants (for numerous reasons) will predictably fail to file NLRB charges regarding the litigation of non-NLRA claims.[46] The Board has no right to "party" status in non-NLRA cases, and non-NLRA statutes obviously vest jurisdiction in the appropriate court or agency, *not* the NLRB. Moreover, the Board only has jurisdiction over certain employers and groups of employees, which contrasts with the very different populations of employers and employees who are litigants in non-NLRA court cases. For example, the NLRA does not apply to railroad or airline employers and employees (who are subject to the Railway Labor Act), and the NLRA's protection excludes managers and supervisors. Therefore, even if there were parallel Board proceedings regarding *every* court case involving a disputed "class" waiver agreement, the Board-ordered "remedy," if somehow imposed on the

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[46] Sec. 10(b) makes clear that the Board may only issue complaints and hold hearings regarding unfair labor practices "[w]henever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice" (emphasis added). See also *National Assn. of Manufacturers v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (Board cannot enforce the Act unless "outside actors" file an unfair labor practice charge, and "neither the Board nor its agents are authorized to institute charges *sua sponte*") (quoting Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law, at 10 (2d ed. 2004)).

non-NLRA courts and agencies, would produce a patchwork where (i) some plaintiffs and defendants would have non-NLRA procedural issues dictated by the NLRB, and (ii) these same procedural issues for other plaintiffs and defendants—even *in the same case*—would be adjudicated by the non-NLRA court or agency.

Nothing in the Act suggests that Congress authorized the Board to engage in these types of haphazard, redundant and self-contradictory enforcement efforts regarding *non*-NLRA laws that, substantively and procedurally, are enforced by courts and agencies *other than* the NLRB. *Sheridan v. U.S.*, 487 U.S. 392, 402 fn. 7 (1988) ("[C]ourts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading."); *U.S. v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940) (even a statute's plain meaning can be disregarded when it leads to "absurd or futile results" or is "plainly at variance with the policy of the legislation as a whole") (footnote and citation omitted).[47]

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[47] In my view, the majority's position here is weakened, not strengthened, by the statement that the majority is not "*guaranteeing* class treatment" but instead only insists that employees have a right to "*pursue* joint, class, or collective claims" (emphasis in original). It is true that *D. R. Horton* conceded "there is no Section 7 right to class certification." 357 NLRB No. 184, slip op. at 10 (2012). However, the majority here—like the Board in *D. R. Horton*—improperly fails to recognize that such an observation effectively concludes the Board's work. There cannot be a violation of Sec. 8(a)(1) unless the employer interferes with, restrains, or coerces employees "in the exercise of the *rights* guaranteed in section

Though well-intentioned, the majority's finding—like the decision in *D. R. Horton*—is incompatible with the Board's statutory duty to accommodate and to avoid undermining Federal laws other than the NLRA. In some respects, the majority's position here resembles its decision in *Fresh & Easy*, where the majority found that a single employee's invocation of a statutory right was inherently for "mutual aid or protection." In my partial dissent, I noted that the Act's "protection"—if applied more broadly than Congress intended or the language of the Act reasonably allows—would delay or obstruct employer investigations regarding non-NLRA complaints and inhibit the vigor with which they can be carried out. Here, as there, what the Supreme Court stated more than 70 years ago continues to be relevant:

> [T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[48]

7" (emphasis added). As explained in the text, it is all the more implausible to suggest Congress vested the Board with authority to intercede and invalidate all kinds of "class waiver" agreements when employees will ultimately be found to have no "right to class certification" *either* under Sec. 7 (*D. R. Horton*, supra) *or* under the non-NLRA rules and statutes that govern a particular claim.

[48] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) (emphasis added); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's

C. The NLRA Expressly Protects the Right of "Individual" Employees—Whether or not Represented—to "Adjust" Non-NLRA Disputes Individually

I disagree with my colleagues' invalidation of Respondent's "class" waiver agreement for another reason: Section 9(a) of the Act explicitly protects the right of every employee *as an "individual"* to "present" and to "adjust" grievances *"at any time."*[49] The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" the substance of any employment-related dispute with his or her employer. This guarantee clearly encompasses agreements as to *procedures* that will govern the adjustment of grievances, including agreements to waive class-type treatment, which does not

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competence to administer, the Board's remedy may be required to yield."); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003) ("[T]he Board . . . is obligated to defer to other tribunals where its jurisdiction under the Act collides with a statute over which it has no expertise."); *New York Shipping Assn. v. Federal Maritime Commission*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]he agency must fully enforce the requirements of its own statute, but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute."), cert. denied 488 U.S. 1041 (1989); *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1501 (2000) (Board cannot adopt interpretation "announcing, in effect, that the NLRA trumps all other Federal statutes"), supplemented 333 NLRB 963 (2001), enfd. 345 F.3d 1049 (9th Cir. 2003)). Cf. *Meyers II*, 281 NLRB at 888 ("Although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws . . . this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes" [citations omitted].).

[49] Sec. 9(a) (emphasis added).

even rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362 ("The use of class action procedures . . . is not a substantive right.") (citations omitted); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "*refrain* from" exercising the collective rights enumerated in Section 7.[50] Thus, Section 9(a) and Section 7 make the same point: even *if* the Act created a substantive right to class-type adjudication of non-NLRA workplace disputes, employees have a protected right *not* to have their claims pursued on a class- wide basis and, instead, to agree such claims will be resolved on an "individual" basis. And employers correspondingly do not commit an unfair labor practice by agreeing to such individual adjustments.

Section 9(a) plays a central role in the NLRA because Congress there established two other core concepts—"exclusive" representation and "majority" support—that provide the foundation for all the Act's provisions regarding union representation. Section 9(a) in its entirety states:

> Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the *exclusive* representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

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[50] Sec. 7 (emphasis added).

> employment, or other conditions of employment: Provided, That *any individual employee* or a group of employees *shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.[51]

Several aspects of Section 9(a) are noteworthy. First, it explicitly preserves the right of every "*individual* employee" to "adjust" grievances, even though Section 9(a) otherwise provides for "*exclusive*" union representation of *all* employees in the bargaining unit (provided the union has majority support).[52] Second,

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[51] Id. (emphasis added).

[52] The Supreme Court has stated that the Act, as reflected in Sec. 9(a), gives effect to "the principle of exclusive representation tempered by safeguards for the protection of minority interests." *Emporium Capwell Co. v. Western Addition*, 420 U.S. 50, 65 (1975). Significantly, in *Emporium Capwell*, the Supreme Court *rejected* arguments by the employee-plaintiffs that NLRB protection was necessary in relation to their efforts to address race discrimination issues that were governed by Title VII. The Court stated: "Whatever its factual merit, *this argument is properly addressed to the Congress, and not to this Court or the NLRB.* In order to hold that employer conduct violates § 8(a)(1) of the NLRA because it violates § 704(a) of Title VII, *we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature. This, obviously, we cannot do.*" Id. at 73 (emphasis added; footnote omitted). The same admonition applies with equal force to the Board's "class" waiver ruling in the instant case and in *D. R. Horton*.

Section 9(a) indicates that, even when there is a certified or recognized union, every "individual" *still* has the right to adjust grievances "*without* the intervention of the bargaining representative" (provided the adjustment is not contrary to any collective-bargaining agreement, and provided the union has been given the opportunity to be present). Id. (emphasis added).

Section 9(a)'s legislative history reveals this structure was no accident. And, more importantly, Section 9(a) and its legislative history squarely contradict the majority's finding here—and in *D. R. Horton*—that Congress prohibited employees from agreeing to pursue claims on an "individual" basis or empowered the Board to insist that claims be addressed on a "group" basis. To the contrary, both when the Act was originally adopted in 1935 *and* when it was amended in 1947, Congress intended that every employee could pursue and resolve his or her claims on *an "individual" basis*, and Congress gave every employee the right, as an "individual," to reach agreements "at any time" with the employer regarding such adjustments.

The original version of the Wagner Act legislation, as reported by the Senate Labor Committee in 1934, stated that "nothing in this Act shall be construed to prohibit an employer from *discussing grievances* with an employee or groups of employe[e]s at any time."[53] When Senator Wagner's substitute bill was introduced in 1935, the substitute bill stated: "[A]ny *individual employee* or group of employees shall have the right at

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[53] S. 2926, 73d Cong. § 10(a) (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act of 1935, at 1095 (1935) (emphasis added). Hereinafter the NLRA's compiled legislative history is referred to as "__ NLRA Hist. __."

any time to *present grievances* to their employer *through representatives of their own choosing.*"[54]

Significantly, when the substitute bill was reported by the Senate Labor Committee—and in the versions adopted by the Senate and reported out of Committee in the House—the "individual employee" language *deleted* the phrase "through representatives of their own choosing." Therefore, the substitute legislation made reference to the right of employees—individually or as a group—to present their own grievances *directly* to the employer: "[A]ny *individual employee* or group of employees *shall have the right at any time to present grievances to their employer.*"[55] This language remained unchanged in the final version of the Wagner Act adopted in 1935. As enacted, Section 9(a) stated in relevant part: "any *individual employee* or group of employees *shall have the right at any time to present grievances to their employer.*"[56]

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[54] S. 1958, 74th Cong. § 9(a) (1935) (as introduced), reprinted in 1 NLRA Hist. 1300 (emphasis added).

[55] S. 1958, 74th Cong. § 9(a) (1935) (as reported by the Senate Labor Committee), reprinted in 2 NLRA Hist. 2291 (emphasis added); H.R. 7937, 74th Cong. § 9(a) (1935) (companion bill in House), reprinted in 2 NLRA Hist. 2850; H.R. 7978, 74th Cong. § 9(a) (1935) (companion bill in House), reprinted in 2 NLRA Hist. 2862; S. 1958, 74th Cong. § 9(a) (1935) (as adopted by the Senate), reprinted in 2 NLRA Hist. 2891; H.R. 7978, 74th Cong. § 9(a) (1935) (as reported by the House Committee on Education and Labor), reprinted in 2 NLRA Hist. 2903. See also S. Rep. 74-573, at 13, reprinted in 2 NLRA Hist. 2313 ("[T]he bill preserves at all times the right of any individual employee or group of employees to present grievances to their employer.").

[56] 49 Stat. 449, § 9(a) (1935), reprinted in 2 NLRA Hist. 3274 (emphasis added).

The NLRA, in 1935, only referred to the right of employees to "*present* grievances" on an "individual" basis.[57] However, the legislative history indicates that Congress contemplated this would include the right to present *and resolve* grievances on an "individual" basis. To this effect, the House report described the "individual employee" language as an important exception to the concept of "majority rule," as follows:

> Since the agreement made will apply to all, the minority group *and individual workers* are given all the advantages of united action. And they are given added protection in various respects. First, the proviso to section 9 (a) expressly states that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer." And the majority rule *does not preclude adjustment in individual cases* of matters outside the scope of the basic agreement.[58]

Notwithstanding the above indication that the Act "[did] *not* preclude adjustment in individual cases" (id.), the Board narrowly interpreted 9(a)'s language permitting employees to "present" grievances. Thus, the Board in several cases concluded that the Act prohibited the adjustment of disputes by individuals, as opposed to the bargaining representative.[59] This prompted Congress, as part of the Taft-Hartley amend-

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[57] Id. (emphasis added).

[58] H.R. Rep. 74-972, at 19 (1935), reprinted in 2 NLRA Hist. 2929 (emphasis added).

[59] See, e.g., *North American Aviation, Inc.*, 44 NLRB 604, 605-606 (1942), enf. denied 136 F.2d 898 (9th Cir. 1943); *Hughes Tool Co.*, 56 NLRB 981, 982-983 (1944), enfd. as modified 147 F.2d 69 (5th Cir. 1945).

ments adopted in 1947, to expand the "individual employee" language in Section 9(a).[60] Based on these changes, Section 9(a) now states that "*any individual employee* or a group of employees shall have the right *at any time* to present grievances to their employer *and to have such grievances adjusted*, without the intervention of the bargaining representative."[61]

The House report explained that Section 9(a)'s amended language was intended to ensure the Board gave "full effect" to the "individual employee" language set forth in the original Act:

> Like the present act, this clause of the amended act would make representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purposes of collective bargaining. The present act provides that any individual employee or group of employees may "present grievances to their employer." *Putting a strange construction upon this language, the Labor Board says that while employees may "present" grievances in person, the representative has the right to take over the grievances.* The present bill *permits*

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[60] See, e.g., 61 Stat. 136, § 101 (1947) (amending Sec. 9(a)), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act (LMRA), 1947, at 1 (1948). Hereinafter the LMRA's compiled legislative history is referred to as "__ LMRA Hist. __." See also S. 1126, 80th Cong., Title I, § 9(a) (1947), reprinted in 1 LMRA Hist. 116-117; H.R. 3020, 80th Cong., Title I, § 9(a) (1947), reprinted in 1 LMRA Hist. 244.

[61] Id. The Taft-Hartley amendments included additional language in Sec. 9(a) requiring that any adjustment be "not inconsistent with the terms of a collective-bargaining contract or agreement then in effect" and that "the bargaining representative has been given opportunity to be present at such adjustment." Id.

> *the employees and their employer to settle the grievances*, but only if the settlement is not inconsistent with the terms of any collective-bargaining agreement then in effect. *The proviso is thus given its obvious and proper meaning.*[62]

Along similar lines, the Senate report stated:

> The revisions of section 9 relating to representation cases make a number of important changes in existing law. An amendment contained in the revised proviso for section 9 (a) *clarifies the right of individual employees or groups of employees to present grievances.* The Board has not given full effect to this right as defined in the present statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, *even though the individual employee might prefer to exercise his right to confer with his employer alone. . . .* The revised language would make it clear that *the employee's right to present grievances exists independently of the rights of the bargaining representative*, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect.[63]

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[62] H.R. Rep. 80-245, at 34, reprinted in 1 LMRA Hist. 325 (emphasis added).

[63] S. Rep. 80-105, at 24 (1947), reprinted in 1 LMRA Hist. 320 (emphasis added). See also H.R. Rep. 80-510, at 46 (1947) (Conference report), reprinted in 1 LMRA Hist. 550 ("[T]his provision has not been construed by the Board as authorizing the employer to settle grievances thus presented. Both the House bill and the Senate amendment amended section 9(a) of the existing law to

As reflected in Section 9(a) and its legislative history, Congress guaranteed every employee's right "at any time," as an "individual," to "adjust" the merits of any dispute. Section 9(a) accomplishes this by safeguarding "from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee."[64] This "individual" right is available to represented and unrepresented employees alike. This "individual" right of employees to "adjust" the *merits* of any dispute "at any time" necessarily encompasses the right of employees to agree with their employer, on an "individual" basis, regarding nonsubstantive *procedures* governing the resolution of such disputes. *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362; *Deposit Guaranty National Bank v. Roper*, 445 U.S. at 332.[65] As noted previously, this

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specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective bargaining contract in effect.").

[64] *Black-Clawson Co. v. Machinists*, 313 F.2d 179, 185 (2d Cir. 1962).

[65] Respondent's "class" waiver bears no resemblance to agreements that are unenforceable because they purport to defeat or negate rights afforded under the Act. For example, in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), cited by the majority here, the employer refused to bargain with a union that had been designated as the representative by more than 75 percent of the work force, and the employer then secured individual agreements where employees "relinquished" the right to have a "signed agreement with any union." Id. at 355. On these facts it was self-evident that the individual agreements were "procured through violation of the Act" *and* were a "continuing means of violating it." Id. at 365. Along similar lines, Sec. 3(a) of the Norris-LaGuardia Act prohibits private agreements (commonly known as "yellow-dog contracts") where an employee "undertakes or promises not to join,

right under Section 9(a) is reinforced by Section 7, which protects the right of employees to "refrain from" engaging in activities that have statutory protection. Taken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers—and not the NLRB—to choose for themselves *whether* to pursue non-NLRA disputes on a "collective" versus "individual" basis.

In *D. R. Horton*, the Board contrasted employee "class" waivers (which the majority finds invalid here, as did the Board in *D. R. Horton*) with union-negotiated agreements barring employees from filing non-NLRA court claims (which the Supreme Court declared valid in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009)). The Board suggested that individual employees were inherently incapable of entering into agreements waiving class-type procedures affecting non-NLRA claims, and the Board stated that Section 7 rights could be waived only by "a properly certified or recognized union" because a union-negotiated agreement "stems from an *exercise* of Section 7 rights: the collective-bargaining process." *D. R. Horton*, supra, slip op. at 10 (emphasis in original).

In my view, these observations in *D. R. Horton* are fundamentally flawed. Again, Section 7 protects not

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become, or remain a member of any labor organization" (cited in *D. R. Horton*, 357 NLRB No. 184, slip op. at 6, 11). See also *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (cited in *D. R. Horton*, supra, slip op. at 4). Unlike these examples, Respondent's "class" waiver has virtually no impact on rights directly afforded under the NLRA. Rather, the waiver focuses exclusively on non-NLRA claims and complaints, and it deals exclusively with nonsubstantive procedural issues.

only employees who "bargain collectively through representatives of their own choosing," but also employees who exercise the "right to refrain from any or all of such activities." The Supreme Court in a long line of cases also has upheld the enforceability of individual employment agreements regarding mandatory arbitration of non-NLRA claims. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Consequently, the Act does not render individual employee agreements inherently suspect or unenforceable, particularly when the agreements relate exclusively to non-NLRA legal rights. In this context, the Supreme Court held in *14 Penn Plaza LLC v. Pyett*: "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." 556 U.S. at 258.

Furthermore, Section 9(a) and its legislative history —as described above—contradict the fundamental premise of *D. R. Horton* and the majority's reasoning here. Regarding the procedures applicable to non-NLRA claims and disputes, the Act does not favor or disfavor "individual" versus class-type resolutions. If anything, the Act is silent with respect to class-type procedures, but it specifically protects "individual" adjustments, even by represented employees that have a bargaining representative. This is directly provided for in Section 9(a), and it was the specific focus of legislative attention by Congress both when the Act

was adopted in 1935 and when it was amended in 1947.[66]

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[66] I respectfully disagree with the majority's suggestion that the protection afforded to "individual" adjustments under Sec. 9(a) has no application to agreements entered into between employees and an employer at the commencement of their employment relationship. In my view, two considerations negate arguments that such agreements are unlawful because, as characterized by the majority, they are a condition of employment. First, there is virtually no support for the proposition that agreements entered into at the commencement of employment are thereby invalid. To the contrary, the Supreme Court has squarely rejected the view that arbitration agreements are invalid on such grounds. *Gilmer*, above, 500 U.S. at 33. Countless other courts have enforced employment agreements, in part because the commencement of employment constitutes adequate consideration for the employee commitments contained in such agreements. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366-367 (7th Cir. 1999) (rejecting, "as have numerous courts," plaintiff's argument that contract was unenforceable because it was "a condition of her employment"), cert. denied 528 U.S. 811 (1999); *Cubic Corp. v. Marty*, 185 Cal. App. 3d 438, 448 (Cal. Ct. App. 1986) ("[T]he Agreement was a condition of employment and . . . the employment was adequate consideration for the Agreement."). Second, the majority's position is expressly contradicted by Sec. 9(a), which protects the right of employees and employers "at *any time*" to enter into agreements regarding "individual" adjustments (emphasis added). This language precludes the majority's premise that "individual" agreements, under Sec. 9(a), may only be lawfully entered into at some times but not others.

Nor do I agree with the majority's suggestion that Sec. 9(a) only applies when there is union representation and that any right conferred by the proviso to Sec. 9(a) "exists largely at the sufferance of the union." Sec. 9(a) and its legislative history are precisely to the contrary. Sec. 9(a) confers broad rights on employees, distinct from any rights enjoyed by a union, and the overt purpose of Sec. 9(a)'s proviso is to ensure that union representation does not supplant the right to adjust grievances on an "individual" basis "at any time."

Similar considerations warrant a conclusion that the majority here improperly declares unlawful Respondent's motion to dismiss that was filed (and, indeed, granted by the court) in the FLSA proceeding initiated by the Charging Party. I believe my colleagues' finding of illegality infringes on Respondent's constitutional rights under the Petition Clause of the First Amendment. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co.*, 536 U.S. 516 (2002). Although it is true that the Board does not run afoul of First Amendment rights if it invalidates litigation efforts that have "an objective that is illegal under federal law," *Bill Johnson's Restaurants*, 461 U.S. at 737 fn. 5, the above discussion demonstrates, in my view, that Respondent's "class" waiver does not contravene any right that is afforded under Section 7. Moreover, Section 9(a) establishes that the Charging Party and other employees were privileged, under the Act, to agree on the "individual" adjustment of non-NLRA claims and complaints. For these reasons, this case gives rise to the very significant concerns expressed by the Supreme Court about the First Amendment right to petition the government in legal proceedings. In my view, therefore, Respondent's "well-founded" motion to dismiss based on the class waiver "may not be enjoined as an unfair labor practice," and I believe my colleagues' finding infringes on Respondent's "First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurant*, 461 U.S. at 741, 743.

D. The Federal Arbitration Act Precludes the Board from Invalidating "Class" Waivers Contained in an Employment Agreement that Provides for Arbitration

The above points relate to the scope of Section 7 in relation to non-NLRA claims and complaints, without even considering the treatment one must afford arbitration agreements under the FAA. See, e.g., *Circuit City Stores, Inc. v. Adams*, supra. As to this issue, I agree with part III of Member Johnson's dissenting opinion and the dozens of court cases that have refused to apply *D. R. Horton*, supra, and have enforced individual waivers of class-type claims in the context of mandatory arbitration agreements.

E. The Remedies Ordered in this Case are not Appropriate

For the above reasons, I believe the majority's remedial order is not appropriate. However, some comment is warranted regarding the required payment of attorneys' fees incurred in opposition to the Respondent's motion to dismiss filed in the FLSA action initiated by the Charging Party.

The Supreme Court has indicated that the Board may order reimbursement of attorneys' fees if an employer violates the Act based on a non-NLRA lawsuit that has a "retaliatory motive" *and* lacks any "reasonable basis" in the non-NLRA proceeding.[67] In the instant case, however, neither characterization fairly describes the Respondent's motion to dismiss.

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[67] See *Bill Johnson's Restaurant*, 461 U.S. at 749.

As noted in parts B and C above, the Act and its legislative history make it unreasonable to conclude that the Respondent's enforcement of an agreement regarding class-type procedures constitutes a retaliatory motive (i.e., hostility based on the exercise of NLRA-protected rights).

It is even less defensible to suggest that the Respondent lacked a "reasonable basis" for filing a motion to dismiss in the FLSA proceedings to enforce the class waiver agreement entered into by the plaintiffs. Here, it is important to recognize that the Respondent filed a *meritorious* motion that *the district court granted* pursuant to the FLSA (a statute that vests the courts, and not the NLRB, with jurisdiction over its enforcement). In other words, the majority orders the Respondent to pay the plaintiffs' attorneys' fees regarding an FLSA issue as to which *the plaintiffs lost*, and as to which *the Respondent prevailed.* As a general matter, any attorneys' fee award is a departure from the "American rule," which generally provides that parties in legal proceedings are not entitled to a payment of their attorneys fees.[68] However, the

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[68] Litigants under the "American rule" are usually only permitted to receive payment of their attorneys' fees if the relevant statute expressly provides for fee-shifting in favor of a prevailing party. The Court of Appeals for the D.C. Circuit has held that the Board lacks fee-shifting authority regarding its own proceedings. See *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997). The Board is unable to seek a recovery of its own fees from litigants before the Board. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12-13 (1940) (Board lacks authority to require "payments to the Federal, State, County, or other governments" to redress "an injury to the public"). Moreover, the Board has a well-established track record of opposing petitions seeking a recovery of attorneys'

majority here not only awards a recovery of attorneys' fees, the Board is awarding fees in favor of *non-prevailing* parties in a proceeding over which the Board has no jurisdiction whatsoever. There is not a hint in the Act or its legislative history that Congress intended to vest this type of remedial authority in the Board.

The majority's fee-shifting award also disregards the fact—as described in Member Johnson's separate opinion—that the overwhelming majority of courts considering it have rejected the Board's position on "class" action waivers. Indeed, *D. R. Horton* itself was denied enforcement by the Court of Appeals for the Fifth Circuit. *D. R. Horton, Inc. v. NLRB*, supra. This makes it all the more evident that Respondent's meritorious motion to dismiss was not lacking any "reasonable basis," which is a prerequisite to having an NLRB-imposed remedy for retaliatory litigation.

In short, the majority orders Respondent to reimburse nonprevailing parties for attorneys' fees resulting from (i) the Respondent's filing of a meritorious motion, (ii) that the district court granted, (iii) consistent with dozens of other court decisions, (iv) in a legal proceeding where the Board is not a party and has no jurisdiction; and (v) where the singular case relied upon by the Board was itself denied enforcement by the court of appeals. *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362. I believe these considerations demonstrate,

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fees *from* the Board pursuant to the Equal Access to Justice Act. *Camelot Terrace*, 357 NLRB No. 161, slip op. at 11 (2011) (Member Hayes, dissenting); *Raley's*, 348 NLRB 382, 388 (2006); *Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 4-6 (Member Miscimarra, dissenting).

at a minimum, that the majority's attorneys' fee award is unwarranted in the circumstances presented here.

Conclusion

For the reasons described above, I respectfully dissent.

Dated, Washington, D.C. Oct. 28, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

In today's decision, the Board punishes Murphy Oil for attempting to enforce an arbitration agreement according to its terms. Under the Federal Arbitration Act (FAA), that result would be bad enough. But, in reality, this case is about much more than that. It poses the unfortunate example of a Federal agency refusing to follow the clear instructions of our nation's Supreme Court on the interpretation of the statute entrusted to our charge, and compounding that error by rejecting the Supreme Court's clear instructions on how to interpret the Federal Arbitration Act, a statute where the Board possesses no special authority or expertise. An agency should tread carefully in areas outside its field of expertise, rather than circumvent Supreme Court decisions that control fundamental issues of law in those areas. An agency should also pay heed after a vast majority of courts express disagreement with the agency's attempted interpretation of such

laws outside its expertise. But here, the Board majority has done neither. Instead, with this decision, the majority effectively ignores the opinions of nearly 40 Federal and State courts that, directly or indirectly, all recognize the flaws in the Board's use of a strained, tautological reading of the National Labor Relations Act in order to both override the Federal Arbitration Act and ignore the commands of other Federal statutes. Instead, the majority chooses to double down on a mistake that, by now, is blatantly apparent.

The majority's essential rationale for its choice boils down to: "Our law is *sui generis*." But the claim of "we're special" has never amounted to a reason to ignore either the Supreme Court or the general expertise of the judiciary in construing statutes, especially those outside the National Labor Relations Act. Accordingly, I dissent from the majority opinion.

Introduction

Many employers agree with their employees that employment-related disputes will be resolved through arbitration. These agreements are increasingly common because, as the Supreme Court has recognized, they provide both employers and employees with a speedy, inexpensive, and informal method for resolving their disputes.[1] The "national policy favoring arbitration"—as the Supreme Court has described it—plainly sup-

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[1] *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010) (parties to arbitration agreement "realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes").

ports the use of such agreements.[2] In this case, the Respondent implemented arbitration agreements for its work force that require that all employment-related disputes be resolved through individual arbitration, rather than court claims where a single employee purports to represent an aggregate body of employees in a class, collective, or representative action. When Charging Party Sheila Hobson and three other employees sued the Respondent for alleged Fair Labor Standards Act (FLSA) violations in Federal court in a collective action, the Respondent filed a motion to compel arbitration to enforce its agreement with them.

Despite the established national policy favoring arbitration, the Board has attempted to restrict the use of such agreements in *D. R. Horton*[3] 2 years ago and now again in today's decision. Both opinions rest on the following faulty steps of logic: (1) employees have a "substantive" Section 7 right under the Act guaranteeing them the use of class and collective action procedures—even though such procedures originate and exist under completely different statutes—in order to collectively pursue workplace grievances (with such grievances also arising under other statutes); (2) any arbitration agreement that restricts an individual employee from ultimately using such class or collective litigation procedures interferes with that Section 7 right, violates Section 8(a)(1) of the Act, and is therefore void; and (3) this holding does not conflict with the national policy favoring the enforcement of

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[2] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

[3] 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing denied __ F.3d __ (5th Cir. 2014).

arbitration agreements as written, embodied in the Federal Arbitration Act (FAA), and elucidated by repeated and recent decisions by the United States Supreme Court.[4] The result of this unsound approach has been near universal condemnation from the federal and State Courts.[5]

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[4] 9 U.S.C. § 1 et seq.

[5] See, e.g., *D. R. Horton v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Sylvester v. Wintrust Financial Corp.*, No. 12-C-01899, 2013 WL 5433593 (N.D. Ill. 2013); *Delock v. Securitas Security Services USA*, 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012); *Jasso v. Money Mart Express Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012); *LaVoice v. UBS* Financial Services No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Palmer v. Convergys Corp.*, No. 7:10-CV-145, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. 2012); *Cohen v. UBS Financial Services* 2012 WL 6041634 (S.D.N.Y. 2012); *Morris v. Ernst & Young LLP*, 2013 WL 3460052, 20 Wage & Hour Cas. 2d (BNA) 1807 (N.D. Cal. 2013); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588 (S.D.N.Y. 2013); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 WL 6158040, 21 Wage & Hour Cas. 2d (BNA) 1600 (N.D.Cal. 2013); *Siy v. CashCall, Inc.*, 2014 WL 37879 (D. Nev. 2014); *Cohn v. Ritz Transportation Inc.*, 2014 WL 1577295 (D. Nev. 2014); *Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390 (S.D.N.Y. 2013); *Hickey v. Brinker International Payroll Co., L.P.*, 2014 WL 622883, 22 Wage & Hour Cas. 2d (BNA) 248 (D. Colo. 2014); *Zabelny v. CashCall, Inc.*, 2014 WL 67638, 21 Wage & Hour Cas. 2d (BNA) 1556 (D. Nev. Jan 08, 2014); *Ryan v. J.P. Morgan Chase & Co.*, 924 F. Supp. 2d 559 (S.D.N.Y. Feb 21, 2013); *Long v. BDP International Inc.*, 919 F. Supp. 2d 832 (S.D. Tex. 2013); *Green v. Zachry Industries Inc.*, __ F. Supp. 2d __ 2014 WL 1232413 (W.D. Va. 2014); *Appelbaum v. Auto-Nation Inc.*, 2014 WL 1396585 (C.D. Cal. 2014); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211 (C.D. Cal. 2013);

Cilluffo v. Central Refrigerated Services, 2012 WL 8523507 (C.D. Cal. 2012), order clarified by 2012 WL 8523474 (C.D. Cal. 2012), reconsideration denied by 2012 WL 8539805 (C.D. Cal. 2012), motion to certify appeal denied by 2013 WL 3508069 (C.D. Cal. 2013); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157 (D. Kan. 2012); *Torres v. United Healthcare Services*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013), appeal withdrawn 13-707 (2d Cir. Feb 27, 2014); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129, 173 Cal. Rptr. 3d 289 (Cal. Jun 23, 2014); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 144 Cal. Rptr. 3d 198 (1st Dist. Jul 18, 2012); *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487, 145 Cal. Rptr. 3d 432, (4th Dist. Aug 09, 2012); *Goss v. Ross Stores, Inc.*, 2013 WL 5872277 (1st Dist. Oct 31, 2013); *Outland v. Macy's Department Stores, Inc.*, 2013 WL 164419 (Cal. App. 1 Dist. Jan 16, 2013); *Rivera v. Hilton Worldwide, Inc.*, 2013 WL 6230604 (4th Dist. Nov 26, 2013); *Teimouri v. Macy's, Inc.*, 2013 WL 2006815 (4th Dist. May 14, 2013); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537, 146 Cal. Rptr. 3d 616 (2nd Dist. 2012), review granted and opinion superseded by 288 P.3d 1287, 149 Cal. Rptr. 3d 675 (Cal. 2012); *Leos v. Darden Restaurants, Inc.*, 217 Cal. App. 4th 473, 158 Cal. Rptr. 3d 384 (2nd. Dist. 2013), review granted and opinion super seded by 307 P.3d 878, 161 Cal. Rptr. 3d 699 (Cal. 2013); *Brown v. Superior Court*, 216 Cal. App. 4th 1302, 157 Cal. Rptr. 3d 779 (6th Dist. 2013), review granted and opinion superseded by 307 P.3d 877, 161 Cal. Rptr. 3d 699 (Cal. 2013). But see *Brown v. Citicorp Credit Services*, No. 1:12-cv-00062-BLW, 2013 WL 645942, at *3 (D. Idaho Feb. 21, 2013); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012), reconsideration denied 2014 WL 291941 (W.D. Wisc. 2014); *Grant v. Convergys Corp.*, No. 4:12-CV-496, 2013 WL 781898 (E.D. Mo. 2013), cert. for interlocutory appeal 2013 WL 1342985 (E.D. Mo. 2013), appeal dismissed No. 13-2094 (8th Cir. 2014). Even the California Supreme Court, no recognized foe to class actions, has recognized that *D. R. Horton's* approach is a failure. See *Iskanian*, above. My dissent echoes, but also expands upon, many of the points made in these court decisions.

This response is hardly surprising. Neither Section 7 nor Section 8(a)(1) reaches as broadly as the *D. R. Horton* opinion or the majority today claims. In short, Congress has already and fully delimited the particular rules for aggregating mass claims in litigation within Rule 23 of the Federal Rules of Civil Procedure (FRCP) dealing with class actions generally and, for specific types of claims under the Fair Labor Standards Act (FLSA) and Age Discrimination Act, within their own unique set of "collective action" rules. In other words, Congress was the author, and the courts the chief interpreters, of all the class and collective action rules about which the majority so expansively opines here in today's decision. And, Congress and the courts, including our Supreme Court, have repeatedly characterized or held that these rules are procedural ones, not substantive rights or remedies. As an agency inferior to Congress and the courts, we are bound by that determination. We cannot simply "wave the magic wand" of NLRA adjudication over this body of law to declare what was formerly procedural to now be substantive under our statute. Indeed, coming to the correct conclusion that these rules are procedural should be fairly easy for us, since these statutes are obvious about their nature. For example, it does not take advanced legal training to determine that a set of rules entitled the "Federal Rules of Civil Procedure" are actually procedural rules.

And even if the majority was right that under the Act we could possibly construe what are litigation procedures that arise under other statutes as Section 7 rights, the Supreme Court has repeatedly reminded the Board not to ignore other and equally important Congressional objectives. Frequently, the entire scope

of the Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[6]

Both *D. R Horton* and the majority's new gloss on it fail that test. The Supreme Court has repeatedly held that arbitration agreements must be enforced *according to their terms* unless the FAA's mandate to do so has been overridden by a contrary Congressional command contained in another statute.[7] That command must be express in the actual text of that statute; silence in the text is insufficient.[8] The Act, of course, contains no such command. Therefore, under the Supreme Court's binding model of statutory interpretation for determining and resolving FAA-related conflicts with other statutes, the Act neither conflicts with, nor can it displace, the FAA. Without Section 7 expressly condemning arbitration or the type of arbitration provision here at issue, we cannot interpret it to override the FAA.

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[6] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

[7] See, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct 2304, 2309 (2013).

[8] See *CompuCredit Corp. v. Greenwood*, 132 S. Ct 665, 672, 673 (2012); see also *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 474 (5th Cir. 2002) ("In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA."). The FAA also does not require arbitration if a generally applicable defense to contract enforcement applies, but that exception is also inapplicable here.

Not only is the Act's textual silence deafening here, the Supreme Court has further directed us to interpret *the FAA itself* in a manner that precludes the majority's rationale. The majority's rationale on this point is that (1) Section 7 rights are substantive, (2) the opportunity to pursue a class action is a Section 7 right and remedy, and (3) the Supreme Court has instructed that a valid arbitration agreement under the FAA may not require a party to prospectively waive its "right to pursue statutory remedies" (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 fn. 19 (1985)). Thus, the majority concludes that the FAA cannot possibly allow an agreement with a provision precluding class/collective action procedures, because that is a waiver of Section 7 rights and remedies.

The problem is that such an interpretation of the FAA—which otherwise requires an agreement to be enforced exactly according to its terms—would allow Section 7 to swallow up the FAA itself. As the majority concedes, in *Concepcion*, the Supreme Court held that an individual-basis arbitration agreement (also known as a "class action waiver")[9] was enforceable under the FAA, and served valid goals of speed and efficiency. However, that was not all. In that case, the Supreme Court also prohibited the circular reasoning

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[9] Many commentators, courts, and indeed the Agreements here, refer to provisions that require dispute resolution on an individual basis as "class action waivers." For clarity of reference, I adopt the same terminology below. However, I note that these provisions could just as easily be called "individual-basis arbitration agreements," especially as class action arbitrations tend to be the *exception* within the universe of arbitrated disputes rather than a traditional norm to be "waived."

deployed here by the majority in its interpretation of the FAA. Notably, the Court *forbade* such an interpretation when it decided that the FAA's savings clause could not be construed to include a right that would be "absolutely inconsistent" with the FAA's provisions. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). As the Court trenchantly put it, "the [Federal Arbitration A]ct cannot be held to destroy itself." Id.

The majority ignores the Court's binding statement of interpretive principles here, instead attempting to leverage *Mitsubishi*'s general guidance into a license to blow up the FAA's allowance of class action waivers. But *Mitsubishi*'s admonition against waiver of remedies is dictum that has never been applied by the Court to invalidate any arbitration agreement. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct 2304 at 2310. The majority's FAA analysis thus rests upon the thinnest of reeds. In any event, the *Mitsubishi* dicta cannot serve as a self-destruct mechanism any more than the FAA's textual savings clause could. *Mitsubishi*, a case from more than 30 years ago near the dawn of the Supreme Court's FAA jurisprudence, simply cannot support the majority's rationale, where the Supreme Court has flatly and repeatedly rejected such an interpretation in later cases.

The governing law could not be plainer. Provisions in arbitration agreements precluding class actions may not be condemned simply because they restrict an employee's ability to use litigation procedures established under other statutes in litigating those employment-related claims. This is especially so where the governing statutes clearly describe the litigation

procedures as procedural rights. Nor may these kinds of arbitration agreements be condemned on substantive grounds where the FAA, as interpreted by the Supreme Court, not only permits them but regards them as completely supportive of its statutory purpose to encourage the speedy private resolution of disputes.

D. R. Horton condemns these agreements all the same, and in today's decision the majority goes even further and condemns an employer's efforts to enforce those agreements in court. This stance creates a clear conflict not only with controlling Supreme Court precedent, as noted above, but also with every Federal court that has granted one of the motions to compel arbitration the majority today finds unlawful. Make no mistake—the stakes in these underlying cases could not be higher for employers and their ability to operate. More than 5500 FLSA collective actions were filed in Federal court against employers in 2013 alone.[10] Adding in the number of "pure" class actions (i.e., that are not also "hybrid" FLSA collective actions) and representative actions only increases the number of cases in this tsunami of litigation. Most of these cases comprise wage-hour actions seeking very large amounts of damages, if not posing the existential threat of bankrupting the targeted companies. And, at this point in history, it is almost certain that a vast majority of such cases will involve arbitration agreements specifying that disputes will be handled on an individual basis only, and therefore will involve motions to compel arbitration to enforce that provision of the agreements.

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[10] *Wage and Hour Litigation and Compliance 2014*, Practicing Law Institute, pp. 411-584 (Feb. 2014).

As this particular case illustrates, *D. R. Horton* now obligates this agency, upon the filing of an unfair labor practice charge, to weigh in *whenever* such an arbitration agreement with a class action waiver is invoked in court and, in the majority's view, to condemn as unfair labor practices the filing of motions to compel arbitration. The immediate consequence of such an unfair labor practice finding will be a *Board order* awarding not only attorneys' fees to the claimant's side in the underlying litigation, regardless of the merits of that underlying claim, but also protective injunctions against future attempts to enforce the arbitration clause as remedies. This is bad enough.[11] So far, the first wave of Board litigation since *D. R. Horton* issued in 2012 includes no fewer than 37 cases alleging *D. R. Horton* violations that are currently pending before the members of the Board, awaiting disposition, as of October 2014.[12] And many more are pending at the

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[11] I agree generally and concur particularly with Member Miscimarra in part E of his separate dissent that the Act does not permit the remedies of attorneys' fees and an injunction in a Board proceeding based on an employer's *successful* enforcement of its arbitration agreement.

[12] *Advanced Services*, 26-CA-063184; *Convergys Corp.*, 14-CA-075249; *Waterstone Mortgage Corp.*, 30-CA-073190; *24 Hour Fitness USA, Inc.*, 20-CA-035419; *Countrywide Financial Corp.*, 31-CA-072916; *Amerisave Mortgage Corp.*, 10-CA-082519; *Mastec Services Co.*, 16-CA-086102; *Bloomingdale's, Inc.*, 31-CA-071281; *Ralphs Grocery Co., The Kroger Co.*, 21-CA-073942; *Ever-glades College*, 12-CA-096026; *Cellular Sales of Missouri*, 14-CA-094714; *J. P. Morgan Chase*, 02-CA-098118; *Gamestop Corp.*, 20-CA-080497; *Securitas Security*, 31-CA-072179; *Chesapeake Energy Corp.*, 14- CA-100530; *Kmart Corp.*, 06-CA-091823; *d/b/a Concord Honda*, 32-CA-066979; *Nijar Realty, Inc.*, 21-CA-092054; *Neiman Marcus Group*, 31-CA-074295; *Sprouts Farmers Market*, 21-CA-

regional level. Time has not been kind to *D. R. Horton's* confident prediction that its holding "will not result in any large-scale or sweeping invalidation of arbitration agreements."[13] And, given the prevalence of individual arbitration agreements and collective-employment actions noted above, the number of cases in which the Board will have to address charges seeking to invalidate those agreements and attempts to enforce them is not likely to diminish anytime soon, given the majority's opinion. It bears repeating that the *D. R. Horton* theory is a 2-year old theory that had already "failed its field test" with close to 40 court rejections.[14] Yet, my colleagues soldier on.

099065; *Leslie's Poolmart, Inc.*, 21-CA-102332; *Haynes Building Services*, 31-CA-093920; *Network Capital Funding Corp.*, 21-CA-107219; *CPS Security USA, Inc.*, 28-CA-072150; *Pep Boys Manny Moe & Jack of California*, 31-CA-104178; *Domino's Pizza, LLC*, 29-CA-103180; *Multiband EC, Inc.*, 25-CA-108828; *Labor Ready Southwest, Inc.*, 31-CA-072914; *Brinker International Payroll Co.*, 27-CA-110765; *PJ Cheese, Inc.*, 10-CA-113862; *Professional Janitorial Services of Houston*, 16-CA-112850; *Flyte Tyme Worldwide*, 04-CA-115437; *Fuji Food Products*, 21-CA-095997; *Applebees Neighborhood Grill and Bar*, 18-CA-103319; *United Healthcare Svs., Inc.*, 02-CA-118724; and *RPM Pizza*, 15-CA-113753. At least nine of these include allegations of unlawful enforcement that will require the Board to decide whether the respondent violated the Act by filing motions with a Federal or State court.

[13] *D. R. Horton*, above, slip op. at 13.

[14] The majority spends much ink citing various academic articles that support, in whole or in part, the rationale of *D. R. Horton*. With due respect to these authors—academics indeed taught me much of what I know—the Constitution gives the courts the superior role and ultimate authority in interpreting the many statutes in play here.

Far worse than this direct Board involvement in extensive litigation is that the majority's adherence to *D. R. Horton* commits this Agency to de facto intervention in the process of litigating thousands of cases per year under substantive laws other than our Act. The invalidation of individual arbitration agreements otherwise covering disputes arising under those laws effectively distorts that dispute resolution process, substantially raising the financial risks to defending employers who will have to litigate the merits of an individual claim, such as in the underlying wage-hour litigation here, under the Damoclean threat of compensating an entire class. This is an unwise, unjustified, and unprecedented intrusion into the course of Federal or State court litigation merely seeking to enforce arbitration agreements according to their terms.

Facts

The Respondent maintains two individual arbitration agreements. The Respondent's original agreement (the Agreement), which applies to employees hired before March 6, 2012, pertinently states:

> . . . . Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration. . . . Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to,

the Age Discrimination in Employment Act, Title VII of the Civil Rights Acts of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. . . . By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

The Respondent required Charging Party Sheila Hobson to sign the Agreement at the time of her employment in November 2008. In June 2010, Hobson and three additional employees filed a collective action FLSA claim in the United States District Court for the Northern District of Alabama, seeking compensation for alleged violations of the FLSA. The court granted the Respondent's motion to compel arbitration of the plaintiffs' FLSA claim on September 18, 2012, and further ordered that the claim be stayed pending arbitration. *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S (N.D. Ala. 2012). The plaintiffs have not appealed this decision.

The Respondent's modified agreement (the Revised Agreement), which applies to employees hired after

March 6, 2012, includes the above language, in its entirety, with the addition of a single paragraph:

> Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act ("NLRA") to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes Individual or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board ("NLRB"), including, but not limited to, charges addressing the enforcement of the group, class or collective action waiver set forth in the preceding paragraph.

Analysis

For the purpose of this opinion, I assume that, as the majority contends, the Agreement and Revised Agreement waive, or at the least restrict, the ability of employees to institute or participate in class or collective actions involving disputes related to their employment, or to consolidate their claim with those of other employees. Significantly, however, neither agreement restricts in any way the ability of employees to discuss workplace grievances, solicit other employees to join them in presenting such claims to a court or arbitrator, or share information, evidence, or financial

resources for the purpose of litigating such claims. Nor does either agreement impose any job-related consequence on employees who file a lawsuit covered by the waiver. And the Respondent did not undertake any job-related reprisal against the Charging Party or any other participant in the *Hobson v. Murphy Oil* litigation; its sole response to the lawsuit was to file a motion to compel arbitration with the court to enforce the Agreement. In these circumstances, the maintenance and enforcement of these agreements did not violate the Act, and I would therefore dismiss the relevant complaint allegations.[15]

I. SECTION 7 DOES NOT PROTECT MECHANISMS THAT EXIST UNDER OTHER STATUTES FOR AGGREGATING WORKPLACE LITIGATION

Section 7 provides that employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, "to engage in other concerted

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[15] I agree with the majority that employees reasonably would construe the Agreement to prohibit them from filing unfair labor practice charges with the Board and join in finding that the Agreement violated Sec. 8(a)(1) on that basis.

Because I find that the Agreement and Revised Agreement did not violate Sec. 8(a)(1) insofar as they included a waiver of class, collective, or joint litigation, I also find that the Respondent did not violate the Act by filing a motion to compel arbitration to enforce those provisions of the agreements. I therefore do not independently address here the majority's analysis of that enforcement violation, including the circumstances in which a court filing may be condemned as an unfair labor practice consistent with *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), but concur with Member Miscimarra's criticism of that analysis set forth in his separate dissent.

activities for the purpose of collective bargaining, or other mutual aid or protection"—and to refrain from these activities. *D. R. Horton* and today's majority hold that Section 7 protects a lawsuit filed by multiple employee-plaintiffs and class or collective actions filed by an individual employee, regarding wages, hours, or working conditions.[16] This holding dramatically overstates the scope of Section 7 as it applies to workplace litigation.

It is certainly true that Section 7 generally protects concerted employee efforts "to improve their working conditions through resort to administrative and judicial forums."[17] And it is also true that a lawsuit initiated by multiple employees is concerted activity within the meaning of Section 7 because such a lawsuit is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[18] Prior to *D. R. Horton*, however, the Board had never extended this principle to the filing by a single employee of a class or collective action.[19]

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[16] *D. R. Horton*, slip op. at 2-4.

[17] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). Significantly, the Court in *Eastex* specifically stated it was *not* addressing the question of "what may constitute 'concerted' activities in this context." Id. at 566 fn. 15.

[18] *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Here, an employer's unilateral rule, as opposed to an arbitration agreement, that purported to essentially prohibit traditional joinder would fall afoul of the Act.

[19] See, e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-950 (1942) (joining of three employees in FLSA suit constituted concerted activity protected by the Act; discharge of employees violated the Act): *Salt River Valley Water Users Assn.*, 99 NLRB

Undeterred, the Board in *D. R. Horton* made that leap, positing that such litigation "clearly" is concerted because it "seeks to initiate or induce group action."[20] But *D. R. Horton* never explains just what that group action might be. In fact, of course, an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees.[21] While class action liti-

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849, 853-854 (1952) (circulation of a petition designating employee as other employees' agent in an FLSA suit for wages was protected, concerted activity and discharge of petition circulator violated the Act), enfd. 206 F.2d 325 (9th Cir. 1953); *Le Madri Restaurant*, 331 NLRB 269, 269, 275-277 (2000) (suit filed by 19 named employee plaintiffs for violation of Federal and State wage and hour laws was protected, concerted activity; discharge of two plaintiffs violated the Act); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978) (discharge of three employees who together filed breach of contract claim against employer for failing to pay contract rate for wages and truck rentals violated the Act). Contrary to the majority, that four employees filed the action in question has no bearing on the question of whether class or collective action procedures fall within the ambit of Sec. 7 rights. That there are only four cofilers means, as a matter of simple logic, that they are not actually joined by any of the other employees in the work force. Acting to jointly file a single complaint as named plaintiffs or to consolidate individually filed complaints, i.e. matters of traditional joinder, can be protected activity under Sec. 7. See sec. II, infra. But class and collective action procedures create an entirely different litigation mechanism to aggregate potential claims, which, for example, does not rely on the traditional processes where multiple claimants (1) cofile a single complaint or (2) individually file and then consolidate multiple complaints.

[20] *D. R. Horton*, slip op. at 3.

[21] Fed. R Civ. P. Rules 23(b)(1) and (2) provide for mandatory class actions in certain circumstances, where class members have no right to notice of the class action and no opportunity to opt out.

gation affects other employees who are members of the class, and may even benefit them depending on the outcome of the litigation, the Board has squarely rejected the notion that concertedness may be presumed or found on this basis.[22] There is simply no basis for

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Rule 23(b)(3) allows class actions in other situations, if it is the case that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In that setting, class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. Rule 23(c)(2)(B). While a presumption of concerted activity is particularly unjustified for mandatory class actions, the fact remains that even under Rule 23(b)(3) class members are not required to take any affirmative action in order to be bound by the lawsuit, and most often take no such action. See generally *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct 2541 (2011).

[22] See *Meyers*, 281 NLRB at 888 (employee invocation of statutory rights is not inherently "a continuation of an ongoing process of employee concerted activity") and id. at 886 (recognizing instead that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence"); see also GC Memo 10-06 (2010) at 6 (rejecting concept of "constructive concerted activity").

United Parcel Services, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), though cited in *D. R. Horton* for the proposition that a class action lawsuit is protected, concerted activity, is not to the contrary. There, employee Bowlds was discharged after he circulated a petition among employees to join a class action suit alleging violations of a state rest period law, collected money from his fellow employees for the retainer fee, and thereafter kept them informed of the progress of the suit, which was filed with 13 employees including Bowlds named as plaintiffs. In a finding adopted by the Board, the judge concluded that "activities of this nature are concerted, protected activities, and I find this to be so here," id. at 1018, and that Bowlds' discharge was unlawful. I therefore disagree with any implication in *D. R. Horton*

the Board to find that the filing of a class action is concerted under these circumstances, and *D. R. Horton's* presumption of concertedness is contrary to the precedent it cites. The majority relies on *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984), to assert that its radical approach to concerted activity actually comports with precedent. But, this assertion fails upon a close reading of that case. In *City Disposal*, an employee was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes. After his union declined to process his grievance under the applicable collective-bargaining agreement, he filed an unfair labor practice charge with the Board challenging his discharge. An administrative law judge concluded that, even though the employee acted alone in asserting a contractual right, his refusal to operate the truck constituted concerted activity protected by Section 7, and that the employer had therefore committed an unfair labor practice in discharging him. The Board adopted the judge's findings and conclusions, applying its longstanding *Interboro* doctrine, which was based on the conclusions that an individual's reasonable and honest assertion of a right contained in a collective-bargaining agreement is an extension of the concerted

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that *United Parcel Service* stands for the proposition that the filing of a class action lawsuit by a single employee, without more, is protected, concerted activity.

I recognize that FLSA collective actions under 29 U.S.C. § 216(b) use an opt-in procedure, under which employees are notified of the lawsuit and their right to participate. See generally *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 169-170 (1989). This simply illustrates the need for a particularized determination of whether protected, concerted activity is involved, an analysis entirely missing from *D. R Horton.*

action that produced the agreement, and that the assertion of such a right affects the rights of all employees covered by the agreement.[23] The Supreme Court held that the *Interboro* doctrine was a reasonable reading of the Act. That is all *City Disposal* stands for.

In *City Disposal*, however, the Supreme Court concluded that a lone employee could engage in "concerted activity" clearly because invoking a provision of a collective-bargaining agreement is a logical extension of the admittedly concerted activity of bargaining:

> The invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown [the employee at issue] refused to drive

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[23] See *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd., 388 F.2d 495 (2d Cir. 1967).

> a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that, if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective bargaining agreement is, therefore, a concerted activity in a very real sense

465 U.S. at 832-833 (footnote omitted). As the above passage makes eminently clear, the collectively bargained nature of a collective-bargaining agreement is what makes the lone employee's assertion of a grievance under that agreement "concerted activity."

Therefore, this case could not be farther from *City Disposal*. The Federal Rules of Civil Procedure were not collectively bargained. Section 216(b) of the FLSA was not collectively bargained. None of the baseline employment law statutes under which modern class or collective actions are filed in today's modern era are collectively bargained.[24] Instead, these procedures allow anyone (employee or not) to file a claim to represent anyone (employee or not), based on a pleadings definition drafted and controlled entirely by an individual plaintiff's lawyer. That is all fine and good,

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[24] *Meyers*, 281 NLRB at 888 ("Certainly the activity of the legislators themselves cannot be said to be concerted activity within the contemplation of the Wagner Act.").

and in accordance with how modern class actions work, but it is a thousand miles away from the concerted activity theory of *City Disposal.*

Worse yet, in advancing their unprecedented interpretation of Section 7, my colleagues argue that the filing of a class or collective action predicated on a statute that also grants rights to the employee's coworkers is concerted for the exact same reason that the invocation of rights under a collective-bargaining agreement was held concerted in *City Disposal.* Of course, this is a blatant attempt to resurrect the *Alleluia Cushion* theory of implied concertedness ("when an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, . . . we will find an implied consent thereto [by other employees] and deem such activity to be concerted").[25] This theory was rejected in *Meyers*, above, where the Board carefully explained why the assertion of rights under a collective-bargaining agreement was concerted, while "a single employee's invocation of a statute enacted for the protection of employees generally" was not.[26] The *Meyers* Board's conclusion was consistent with the Supreme Court's earlier holding that Section 7 does not inherently create any additional, overlapping protection or remedy for a right that is established under another employment statute. *Emporium Capwell Co.*

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[25] 221 NLRB 999, 1000 (1975); see also *Fresh & Easy*, 361 NLRB No. 14 (2014), slip op. at 14-18, 25-28 (opinions of Members Miscimarra and Johnson, concurring and dissenting) for an extended discussion of the glaring weaknesses of the implied concertedness né "solidarity" theory.

[26] *Meyers*, 281 NLRB at 887.

v. Western Addition, 420 U.S. 50, 72-73 (1975) (Sec. 7 is not violated simply because Title VII has been violated). The majority's resurrection of the discredited *Alleluia Cushion* principle, standing alone, requires that its reading of Section 7 be rejected.

My colleagues misrepresent my views when they accuse me of holding "that employees' concerted legal activity deserves very little, if any protection under Section 7 of the NLRA." Consistent with the actual holdings of the precedent discussed above, Section 7 does cover employees when they speak to other employees about suspected violations of laws affecting their working conditions,[27] actually solicit other employees to join with them in asserting such claims in court or arbitration,[28] pool financial resources to fund the litigation,[29] and actively participate with other employees as litigants in the case.[30] It is this sort of employee-to-employee interaction and cooperation that lies at the heart of the national labor policy, embodied in the Act we uphold, of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."[31] The majority sadly de-

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[27] *United Parcel Service*, 252 NLRB at 1015; see also *Fresh & Easy*, 361 NLRB No. 14, slip op. at 24-25, for my own agreement with the proposition that an individual employee's solicitation of a second employee as a witness to support the first employee's own claim constitutes concerted activity to induce group action, if and where the conduct that gave rise to the claim actually impacted both employees.

[28] *Salt River Valley Water Users Assn.*, 99 NLRB at 849.

[29] *United Parcel Service*, 252 NLRB at 1015.

[30] *Spandsco Oil & Royalty Co.*, 42 NLRB at 942.

[31] 29 U.S.C. § 151.

precates the significance of those interactions by making clear that only the ability to litigate in court on a class or collective basis holds any significance for them, and is uncharitable to suggest that this Member is not supportive of affording employees meaningful Section 7 protection in the litigation context.

In contrast to the above-mentioned employee interactions which are covered by Section 7, a particular litigation mechanism, is, at most, a peripheral concern to the Act, especially where the mechanism is established and defined by statutes *different* than the Act, to handle claims under *different* statutes than the Act, and in a *different* forum than the Board. There, the issue at hand is whether litigants seeking to litigate as a group, whether via joinder of claims or a class or collective action, have satisfied the applicable *procedural requirements* for aggregating claims, and, once the terms of the litigation have been established by the court or arbitrator according to that forum's rules, whether the legal standard to establish a violation of law has been established. The Act protects concerted activity in order to remedy "the inequality of bargaining power" between employees and employers that Congress identified as an obstacle to commerce, in particular, with regard to wages and everyday working conditions.[32] In litigation before a court or arbitrator, bargaining power is irrelevant to the merits or procedural rulings in a case. In contrast, those rulings are determined by the application of established legal principles to the facts of the case by a neutral decisionmaker. For example, the merits of the procedural case as to whether claims aggregation makes sense,

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[32] Id.

and not the "bargaining power" of the litigants, determine the outcome.[33] The policies behind the creation of the Act, therefore, offer no support to the Board imposing its standards here on the collective prosecution and defense of employment claims.

My colleagues dispute the foregoing analysis, and go so far as to term it "novel" and "restrictive." Nothing could be farther from the truth. As indicated above, I agree with the actual holdings of the Board decisions that were cited in *D. R. Horton* with regard to Section 7 protection for concerted litigation activity. But none of those cases holds that the filing of a class or collective action lawsuit by an individual employee, without more, is concerted activity within the meaning of Section 7—a fact the majority does not and cannot dispute. It is thus obviously their interpretation of Section 7, not mine, that is "novel."

II. CONGRESS HAS ALREADY DETERMINED THE CLAIM AGGREGATION PROCEDURES FOR LITIGATION UNDER FEDERAL STATUTES AND IN THE FEDERAL COURTS, AND THE BOARD CANNOT IGNORE THEIR LIMITS OR REWRITE THEM BY LABELING THEM "SECTION 7 RIGHTS"

Regardless of the many obstacles noted above, *D. R. Horton* attempted to impose a guarantee to initiate and pursue class and collective litigation applying to all employment litigation, all the same.

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[33] Nor can it be claimed that the mere requirement of individual arbitration is some kind of harm resulting from bargaining inequality. As the Supreme Court has ruled on many occasions, the FAA precludes any court, or this Agency, from regarding arbitration as inferior to litigation generally, or individual arbitration as inferior to collective litigation or arbitration, specifically. *See, e.g., Stolt-Nielsen*, 559 U.S. at 662.

While acknowledging the obvious point that "there is no Section 7 right to class certification," *D. R. Horton* asserted that Section 7 creates a nonwaivable substantive right "to act concertedly by invoking FRCP Rule 23, Section 216(b), or other legal procedures . . . ."[34] By this holding, *D. R. Horton* attempted to transform Section 7 into a "procedural superhalo" that authorizes class and collective litigation even where Congress and the courts would not and do not under the applicable litigation procedures themselves. The majority opinion today adopts this conclusion without hesitation.[35]

Congress obviously viewed these litigation procedures quite differently. Access to Rule 23 is "a procedural right only,"[36] and "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only" at that.[37] For FLSA, Congress has been even more specific in defining the procedural limitations for aggregate claims. Indeed,

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[34] *D. R. Horton*, slip op. at 10. As discussed below, *D. R. Horton* admits that this asserted right is not infringed if an employer opposes class or collective litigation on any basis other than an individual arbitration agreement.

[35] Indeed, the majority references a theoretical model posed in a law review article 13 years ago to characterize the NLRA, Norris LaGuardia Act, and FAA as a class of "super statutes," and suggests a framework for resolving conflicts among them, borrowing from the same article. See majority opinion, fn. 86, supra. With due respect, the Supreme Court in the last 3 years has made plain how FAA conflicts are to be resolved—the FAA prevails absent an express textual command in the other statute—and unless and until the Court changes course, we are bound by that framework. See sec. III, infra,

[36] *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980).

[37] *Wal-Mart v. Dukes*, 131 S. Ct. at 2550.

Congress made the conscious policy choice to limit FLSA collective actions only to those employees who affirmatively chose to join their own claim to that of the original, named plaintiff's claim—and thus "opt in"—because Congress was concerned about "excessive litigation spawned by plaintiffs lacking a personal interest in the outcome" of such cases.[38] Congress also wished to free "employers of the burden of representative actions" and ensure participation of only those plaintiff employees "who asserted claims in their own right."[39] Stated simply, the very individual-by-individual requirement to sue that "class action waivers" contain, and that *D. R. Horton* condemns, indeed *underpins* the "opt in" mechanism that Congress chose for the FLSA.[40] In effect, rather than expand a

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[38] *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. at 173 (citing 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell).

[39] Id. As Senator Donnell explained:

> Obviously, Mr. President, this [opt-in procedure] is a wholesome provision, for it is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit. So we have provided, as I say, that no employee shall be made a party plaintiff to any such action unless he gives his consent in writing and unless such consent is filed in the court in which the action is brought. Certainly there is no injustice in that, for if a man wants to join in the suit, why should he not give his consent in writing, and why should not that consent be filed in court?

[40] Congress adopted this same "opt in" mechanism with the ADEA as well See *Kimmel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000).

plaintiff's rights, the FLSA collective action provision actually limits the procedural right a plaintiff otherwise would have to file a representative action under Rule 23 without the prior consent of other employees.[41] And Congress intended for access to these exceptional procedures under both Rule 23 and the FLSA to be *waivable*, including as part of an arbitration agreement as in this case.[42]

D. R. Horton's divination of a contrary rule in Section 7 is especially remarkable given that there was no such thing as a class or collective action in any modern sense when the Act was passed in 1935. Congress enacted the FLSA in 1938, and its current collective action procedure was not added until 1947. That "opt in" model certainly does not contemplate mass lawsuits with no participation by other than a few named plaintiffs. It was not until 1966 that Rule 23 of the Federal Rules of Civil Procedure was amended to create the "opt out" class device, which *assumes* as a legal fiction that all similarly situated persons are

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[41] *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014).

[42] *Italian Colors*, 133 S. Ct at 2310 (congressional approval of Rule 23 does not establish an entitlement to class proceedings for the vindication of statutory rights); *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20, 26 (1991) (ADEA collective action procedure waivable); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (FLSA does not preclude the waiver of collective action claims); *Owen v. Bristol Care, Inc.*, 702 F.3d at 1050 (same); *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (same); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (same).

plaintiffs, that the modern class action was created.[43] This was nearly three decades after the drafting and passage of the "mutual aid and protection" language in Section 7. Simple respect for the laws of time indicates that none of these developments in aggregate litigation procedure were intended or contemplated by Congress to be covered when the generalized "mutual aid or protection" language was passed into law in 1935, or reaffirmed in 1947. It is telling that *D. R. Horton* did not cite or rely on a single shred of legislative history to show otherwise.[44] Today's majority

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[43] The majority cites older Federal equity practice to show that the drafters of the Act perhaps had employee class actions in mind as conceivable "mutual aid and protection." However, the majority cannot show that employees could or did typically bring claims as aggregate actions in 1935. More to the point, no less than the Supreme Court has opined that the modern rule "gained its current shape in an *innovative* 1966 revision" of which the new opt-out feature "was the *most adventuresome innovation*," all well after the passage of the Act. *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997) (cites and quotes omitted; emphasis added). There is simply no plausible basis to believe the Act's drafters had any inkling that the Act would incorporate modern-style, opt-out employment class actions.

[44] *D. R. Horton's* bypassing of legislative history unfortunately is symptomatic of its general bypassing of a number of axioms of statutory interpretation. Where a legislative body creates a law to regulate subject matter X—let's call it "Law X"—several things are usually true. Typically, any regulation of X is contained in Law X. And, any fundamental expansion of Law X requires an equally fundamental amendment to Law X. Statutes are expected to contain a "unity of subject matter"—Law X pertains to subject X, such that one does not use an unrelated Law Y to explain Law X. See 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction (Sutherland Statutory Construction)* Sec. 17:1 (7th ed. 2009). Implied repeals and implied amendments of one statute by another are disfavored. Id. at Sec. 22:13. Con-

attempts to deflect this point by equating new legal rules like Rule 23 with new technological phenomena like Facebook, the use of which for Section 7 purposes obviously falls within the Board's regulatory domain. But the problem for the majority's argument here is that new legal rules *are legal rules*. They have their own limits and contours, consciously created by Congress, the courts, or both. These boundaries we are neither free to ignore entirely nor treat other laws like

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gress also typically does not institute radical revisions of Law X by authoring generalized language in Law Y. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes."); *Emporium Capwell*, above, 420 U.S. at 72-73 (Sec. 7 does not supply an additional remedy for a Title VII violation). And, it would be especially puzzling to hold that Congress anachronistically modified Law X (let's say it was passed in 1966 like the modern class action procedure in Rule 23 of the Fed. R. Civ. P.) by statutory language enacted more than 30 years beforehand in Law Y (let's say passed in 1935 like the Act). See fn 35, above. And, just this past term, the Supreme Court found that, in the absence of a showing that Congress intended to elevate one Federal statute over another, a Federal agency authorized to regulated one body of law may not preclude private parties from availing themselves of a well-established remedy pursuant to another body of law, simply because its regulations touch on similar subject matters. "An agency may not reorder Federal statutory rights without congressional authorization." *POM Wonderful LLC v. Coca Cola Co.*, 134 S. Ct. 2228, 2241 (2014) (Food and Drug Administration ("FDA") may not elevate the Food Drug and Cosmetics Act (FDCA) and the FDA's own regulations over the private cause of action authorized by the Lanham Act, when no showing that Congress intended FDCA to have preclusive effect.). Although *D. R. Horton* failed to grapple with any of these interpretive and logical problems, its woeful track record illustrates that Federal and State judges have not overlooked them.

a *tabula rasa* upon which we can etch any given configuration of Section 7 rights.

D. R. Horton inappropriately substitutes the Board's judgment for that of the Congress. Congress has occupied the field in determining the scope of the rights afforded by Rule 23 and Section 216(b), and has given the Board no role to play in the administration of those provisions. To the contrary, their application in a particular case is confided to the Federal courts under Article III of the Constitution. Here, even those courts are constrained by the rules as they exist—as *procedural* rules:

> And, of overriding importance, courts must be mindful that [Federal] Rule [of Civil Procedure] 23 as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness.
> . . . .

Amchem, 521 U.S. 591, 618 (1997).[45] Where "judicial inventiveness" is prohibited, so, too, is our agency prohibited from effectively rewriting Rule 23. And, regardless of whether the Board might believe that the procedures provided by these statutes are somehow "rendered inadequate" or even "violated" because of a class action waiver, the Board cannot then construe

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[45] *Amchem* here noted that the Rules Enabling Act (28 U.S.C. §§ 2071, et seq.) limits the power of courts in expanding Rule 23. It also thus limits the Board. See additionally, infra, at pp. 50-52.

Section 7 to provide an additional remedy. That kind of determination is the province of Congress:

> Whatever [the] factual merit [of the argument that Title VII remedies are inadequate to prevent race discrimination], this argument is properly addressed to the Congress, and not to this Court or the NLRB. In order to hold that employer conduct violates § 8(a)(1) of the NLRA because it violates § 704(a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature.

Emporium Capwell, 420 U.S. at 72-73. It is therefore not surprising that *D. R. Horton's* attempt to convert the class or collective action procedures of other statutes into a nonwaivable substantive Section 7 right has been so unsuccessful to date.[46]

A. Section 8(a)(1) Does Not Prohibit all Limits on Section 7 Activity: it Would Permit the Extremely Tangential Limit on Such Activity, if a Limit at all, Posed by Mere Restrictions on a Particular Litigation Procedure, and it Would Permit Employees to Agree to Such Restrictions

Even if I were to ignore Congress and the courts, and simply look to our own precedent on the limits of

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[46] Nothing in *Eastex* is to the contrary. Instead, the Court in *Eastex* specifically refused to hold broadly that an employer must allow the distribution on its premises of any literature that falls within the protection of Sec. 7, regardless of how attenuated its connection to the employees' immediate terms and conditions of employment. My construction of the Act, rather than the absolutist approach adopted by *D. R. Horton*, is consistent with these principles. See 437 U.S. at 572-575.

Section 7 rights, *D. R. Horton's* broad prohibition of class and collective action waivers still could not stand. Section 8(a)(1) states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. *D. R. Horton* held that the arbitration agreement at issue there, and by extension all arbitration agreements that require arbitration of workplace disputes on an individual basis, restricted the asserted Section 7 right to collective litigation and therefore violated Section 8(a)(1).[47] The Board went on to say, with no supporting analysis whatsoever, that an employer does not violate the Act by opposing class certification on any grounds other than the arbitration agreement.[48] Notably, completely missing from *D. R. Horton* or the majority's opinion today is any explanation of why an employer logically does *not* interfere with protected, concerted activity (as defined in *D. R. Horton*) by opposing class, collective, or group litigation on such grounds. Certainly opposing a class certification motion by filing an opposition pleading can just as surely result in preventing class action status as moving to enforce an arbitration agreement containing a class action waiver. This conceptual flaw

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[47] *D. R. Horton*, slip op. at 4.

[48] Id. at 10 fn. 24. Although *D. R. Horton* does not say so explicitly, I assume the majority would reach the same result with respect to an employer's opposition to FLSA collective action status, or to the joinder of the claims of multiple employees in a single lawsuit, on grounds other than an arbitration agreement.

is one of many showing why the *D. R. Horton* theory has been rejected by a legion of judges.[49].

Contrary to the apparent assumption of the *D.R Horton* opinion, a violation of Section 8(a)(1) is not made out simply by showing that Section 7 activity has been restricted. To the contrary, "[u]nder the 8(a)(1) standard, the Board first examines whether the employer's conduct reasonably tended to interfere with Section 7 rights. If so, the burden is on the employer to establish a legitimate and substantial business justification for

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[49] The majority several times asserts that nothing in its opinion guarantees class certification, but merely "the right to pursue" class certification. That distinction, however, cannot minimize the sea change that *D. R. Horton* made to the class and collective action process under Federal law. The majority's distinction does not alter the fact that Rule 23 and FLSA Sec. 216 procedures have now been converted into substantive rights. For example, the majority's asserted "right to pursue class certification" is no different than finding that there is a substantive right to initially bring a Rule 23 motion, and a substantive right to carry that motion forward until there is an ultimate determination on class certification by a court. *Here, the same set of steps provided by Rule 23 are recast as substantive guarantees*, trumping an arbitration agreement that would otherwise contain a different claims process. Notably, Rule 23 itself does not guarantee class certification, so the majority's disavowal of a "class certification guarantee" is hollow. That "limit" does not meaningfully constrain the *D. R. Horton* rule from being a guarantee of the full Rule 23 process.

And, even if all that the "right to pursue" class certification would entail is the right of an employee's Rule 23 motion to survive challenge by an arbitration agreement containing a class action waiver, that is still a new, substantive right. It is simply creating a privilege for a certain class of Rule 23 litigants—persons who are "employees" under the National Labor Relations Act—that does not exist for *any other Rule 23 litigant*. By any definition, that is creating both a guarantee and a substantive alteration of Rule 23.

its conduct."[50] "It is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."[51] *D. R. Horton* failed to acknowledge, much less undertake, this analysis.

Of course, these principles provide the missing explanation for *D. R Horton's* statement that an employer acts lawfully when it opposes class certification on grounds other than a disputed arbitration agreement. Insofar as the employee conduct at issue is protected by Section 7, any effort by the employer to restrict it interferes with Section 7 rights to some extent. But the impact on those Section 7 rights posed by procedural litigation rules is limited, because employees have no baseline entitlement to collective litigation, under the rules establishing the standards for such litigation, such as Rule 23 and Section 216(b). Further, employers have a legitimate and substantial business justifi-

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[50] *ANG Newspapers*, 343 NLRB 564, 565 (2004). This balance is mandated by the Supreme Court, which has instructed the Board that it must balance:

> the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Republic Aviation v. NLRB, 324 U.S. 793, 797-798 (1945); accord: *Independent Electrical Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 553-554 (5th Cir. 2013), denying enf. to 355 NLRB 1024 (2010).

[51] *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001).

cation for opposing group litigation on such grounds, both because they have a legal right to do so under other Federal statutes and rules of procedure and in order to avoid the cost and liability exposure to which they would otherwise be subjected. Moreover, any effort by the Board to prevent a party to litigation from asserting the defenses to class or collective litigation, or to the joinder of parties, that are available to any litigant would—to put it mildly—raise serious First Amendment issues.[52]

This balancing analysis, required by decades of Board and Supreme Court precedent, also precludes a finding that an employer violates Section 8(a)(1) by entering into an arbitration agreement that requires that employment-related disputes be resolved through arbitration, or precludes class or collective litigation of claims. Employers have legitimate business reasons to adopt such agreements. First, individual arbitration agreements may reduce litigation costs and delays by providing informal, streamlined procedures that can be tailored to the type of dispute they cover.[53] Second, while providing an effective method for resolving covered disputes,[54] agreements that provide for individu-

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[52] See generally *BE&K Construction Co. v. NLRB*, 536 U.S. at 516.

[53] *AT&T Mobility LLC v. Conception*, 131 S. Ct 1740, 1749 (2011). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts").

[54] Arbitration agreements are not enforceable if they prevent the effective vindication of a federal statutory cause of action. *Italian Colors*, 133 S. Ct at 2310. Of course, no arbitration agreement can

al arbitration also shield defendants from "the risk of 'in terrorem' settlements that class actions entail."[55]

Risk avoidance is an interest completely separate from, and neutral to, Section 7 rights. It cannot be gainsaid that the class action device poses the risk—regardless of a case's merits—that settlement becomes the only viable option. As Judge Posner trenchantly discerned nearly 20 years ago in analyzing the risks that a defendant would weigh in a products liability class action,

> Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs . . . win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not

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prevent a party from filing a charge with the Board, and the Revised Agreement makes clear that it is not intended to do so.

[55] *Concepcion*, 131 S. Ct. at 1752. The risks of class litigation are magnified with class arbitration given the extremely limited scope of judicial review available for the arbitrator's opinion: "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." Id.

> wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.[56]

Judge Friendly similarly referred to settlements induced by a small probability of an immense judgment in a class action as "blackmail settlements."[57]

The majority brushes aside these legitimate business interests and justifications by opining "[t]hat concerted legal activity may be a successful means of vindicating employees' legal rights cannot be a legitimate reason to disfavor it." But I believe the majority errs here, in several ways. First, as demonstrated above, claims aggregation poses an increased risk of liability even for meritless claims, due to the simple mathematics of aggregating hundreds or thousands of claims (that would not otherwise exist) into one unitary claim. That aggregated claim will pose a greater risk than any individual claim, regardless of whether it is merited or not. Second, it is axiomatic under class action law that there is no "threshold" or "gatekeeper" determination on the overall merits of a case before the class determination is made (in either the Rule 23 or the FLSA context). See, e.g. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974) (courts have no authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action).[58] Third, because there

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[56] *Matter of Rhone Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995), cert. denied 516 U.S. 867 (1995).

[57] Henry J. *Friendly, Federal Jurisdiction: A General View 120* (1973), quoted in *Matter of Rhone Poulenc Rorer*, above.

[58] The Supreme Court recently clarified that courts have the authority—and sometimes must exercise it—to inquire into the merits to determine whether the merits theory argued is amenable

is no such threshold merits determination, class treatment can and will be initially found justified for a significant number of totally or partially meritless lawsuits. So, the relevant question is not whether a class action in some circumstances can vindicate employee rights (it can), but whether the Board here sees any legitimate interest in avoiding the certainty of aggregated, meritless suits of the kinds Judges Posner and Friendly identified many years ago. Today, the majority holds that employers have no legitimate interest in avoiding such magnitudes of unmerited liability. That is simply wrong. In contrast with the legitimate employer interests at stake, the interference with Section 7 rights of these class action waivers, on the other hand, is relatively slight. They obviously do not interfere in any way with employees seeking to improve their terms and conditions of employment who wish to communicate their desires to each other or to their employer. As noted above, they do not limit any of the classically-recognized kinds of Section 7 rights at all.

The majority disagrees that the Section-7-neutral interest of avoiding unwarranted aggregate liability is a proper subject for Board consideration. The majority's view appears to be that it is Congress' or the courts' job to deal with whatever problems this might pose, not ours. But the Board has the statutory duty and functional responsibility to take account of employer interests in any Section 7 balancing that it performs. What's more, both Congress and the Supreme Court have already told us via the FAA and its associ-

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to classwide treatment, but it still prohibits courts from rendering an actual merits determination in order to decide class action suitability. See *Wal-Mart v. Dukes*, 131 S. Ct at 2550-2552.

ated jurisprudence that there is nothing wrong with a party's desire to avoid class litigation or class arbitration.[59] Here, the Board is simply not doing its job, while also ignoring legislative and judicial recognition of the employer interest at stake.

Moreover, much of the conduct addressed by such waiver provisions is not protected by Section 7 in the first place, as shown above. Certainly, there is no cognizable interference with Section 7 rights in choice of forum agreements that channel disputes into arbitration instead of court (and I do not read *D. R. Horton* or the majority's opinion to hold otherwise). And determining the terms under which claims are to be litigated in the chosen forum (i.e., individually) has only a minor effect on Section 7 rights given the many other restrictions those forums already impose on class or collective litigation under their own rules.[60]

Thus, Federal Rule of Civil Procedure Rule 20 allows the permissive joinder of multiple plaintiffs only if they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and any question of law or fact common

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[59] See *Stolt, Concepcion, Italian Colors*, cited throughout.

[60] See *ANG Newspapers*, 343 NLRB at 565 (employer's legitimate interest in protecting its newspaper against conflicts of interest justified minimal interference with Sec. 7 rights of verbal caution to reporter who spoke to city council on behalf of union and then started story about city government); *Caesar's Palace*, 336 NLRB at 272 (employer's legitimate interest in protecting integrity of investigation of illegal drug activity in the workplace justified intrusion on Sec. 7 rights of rule prohibiting discussion of investigation with coworkers).

to all plaintiffs will arise in the action. Section 216(b) of the FLSA provides for lawsuits for violation of its minimum wage and overtime provisions "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," but "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."[61] And, as discussed above, Federal Rule of Civil Procedure Rule 23 governs class actions in federal court, displacing the "usual rule" of individual litigation:

> The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. In order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'"[62]

Given these extensive requirements, any additional limitation on the use of class or collective actions flowing from an individual arbitration agreement would have at most a minimal effect on Section 7 activity.

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[61] See generally *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. at 173.

[62] *Wal-Mart. v. Dukes*, 131 S. Ct at 2550 (internal citations and quotations omitted).

In balancing the Section 7 rights and employer interests involved here, the Board also must consider the provisions of Section 9(a) of the Act, which affords individual employees the "right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative . . . ."[63] While this provision is cast as a qualification of a union's status as exclusive representative of the unit, it reflects the broader concern of Congress "to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances."[64] Although the 9(a) proviso does not impose on employers an affirmative duty to individually adjust grievances, it suggests that the Board

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[63] 29 U.S.C. § 159(a). Sec. 9(a) also states that the adjustment must not be inconsistent with the terms of a collective-bargaining agreement then in effect and the bargaining representative must have been given an opportunity to be present at the adjustment.

[64] *Black-Clawson Co. v. Machinists Lodge 355*, 313 F.2d 179, 185 (2d Cir. 1962); see also H.R. 245, 80th Cong., 1st Sess. 7 (1947) (Sec. 9(a) "further adds to the freedom of workers by permitting them not only to present grievances to their employers, as the old Board heretofore has permitted them to do, but also to settle the grievances when doing so does not violate the terms of a collective-bargaining agreement, which the Board has not allowed"); H.R. 510, 80th Cong., 1st Sess. 46 (1947), U.S. Code Congressional Service 1947, p. 1152 ("Both the House bill and the Senate amendment amended Sec. 9(a) of the existing law to specifically authorize employers to settle grievances presented by individual employees or groups of employees, so long as the settlement is not inconsistent with any collective bargaining contract in effect."); see generally *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61 fn. 12 (1975).

should not be so quick to condemn those employers who, like the Respondent here, choose to do so through individual arbitration agreements. I concur here specifically with the points made in Member Miscimarra's separate dissent in part C.

My reading of Section 8(a)(1) is also informed by the Supreme Court's holding in *14 Penn Plaza* that a union may waive the right of unit employees to litigate employment discrimination claims in court and instead require their submission to binding arbitration.[65] Although the Court plainly took it as a given that employees could execute such a waiver individually, *D. R. Horton* and the majority nevertheless dismiss *14 Penn Plaza* on the grounds that a union's waiver of statutory rights "does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment."[66] In my view, the Court undercut this reasoning when it stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[67] In any event, I cannot so easily adopt the view that a union may waive employees' rights with regard to the litigation of employment claims—even over an individual employee's strenuous objection—but employees *somehow* cannot waive the same rights on their own. That defies logic.[68]

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[65] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

[66] *D. R. Horton*, slip op. at 10.

[67] *14 Penn Plaza*, above, 556 U.S. 247, 258.

[68] The majority's implicit suggestion that the mere presence of a union *qua* union makes nonwaivable rights waivable underscores

Contrary to the assertions in *D. R. Horton*, *National Licorice Co. v. NLRB*,[69] and *J.I. Case Co. v. NLRB*,[70] do not support a broader reading of Section 8(a)(1). In *National Licorice*, the employer entered into contracts with its employees in which the employees agreed that they would not strike, demand a closed shop or signed agreement with any union, and that an employee's discharge could not be submitted to arbitration or mediation.[71] The agreements themselves had been procured in response to the employees' designation of a union as their representative for collective bargaining and were part of an overall scheme to prevent

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the faulty logic here. Sec. 7 rights exist independently of the presence of a bargaining representative.

Although my colleagues protest that union representation makes a difference in the workplace, they mistakenly accuse me of ignoring that principle. Of course union representation makes a difference in the workplace—but, contrary to the majority, that difference is not limited to a union's undisputed power to waive rights employees otherwise would possess. Consistent with the actual holdings of *J.I. Case* and *National Licorice*, infra, if employees select union representation their employer must bargain in good faith over a grievance procedure, regardless of any previously-executed individual arbitration agreement, and may not exclude the union from its statutory role in grievance adjustment on the basis of such agreements or any other grounds. It is the majority's position, which effectively attempts to place unrepresented employees on the same footing, not mine, that diminishes the significance of union representation.

[69] 309 U.S. 350, 359-360 (1940).

[70] 321 U.S. 332 (1944).

[71] The agreements also apparently provided for arbitration of wage rates, but neither the Board nor the Court found this provision independently unlawful or addressed whether the agreement was protected by the FAA.

unionization.[72] In these circumstances, the Court held that the agreements unlawfully "imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by ss 7 and 8 of the Act" and that the Board therefore could prohibit the employer from enforcing them.[73]

None of the factors on which the Court relied in *National Licorice* are present here. The Agreement and Revised Agreement were not procured in response to employees' effort to unionize, and do not even arguably restrain their right to organize and bargain collectively. I respectfully disagree with *D. R. Horton's* overbroad characterization of the Court's opinion in *National Licorice* as invalidating "agreements that employees will pursue claims against their employer only individually."[74] Instead, the Court condemned such agreements only insofar as their purpose or effect was to foreclose any role for a union in the adjustment of the

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[72] The Court and Board both held the contracts were simply an artifice to eliminate support of the existing union, and, by doing so, interfere with employees' right to organize and bargain collectively:

> The contracts, as the Board found, were not only procured through the mediation of a company-dominated labor organization, but they were the means adopted to "eliminate the Union as the collective bargaining agency of its employees." We think it plain also that, by their terms, they imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the Act.

309 U.S. at 359-360.

[73] *National Licorice*, 309 U.S. at 360.

[74] *D. R. Horton*, slip op. at 4.

dispute. No evidence or contention of that character is present here.[75]

J.I. Case is inapplicable for similar reasons. There, the Court held that an employer could not lawfully refuse to bargain collectively with a union that represented its employees on the basis of individual agreements previously reached with those employees. That holding would be applicable only if the Respondent relied upon the Agreement or Revised Agreement as a basis for refusing to bargain over terms and conditions of employment (including a grievance arbitration procedure) with a duly certified or lawfully recognized union representing its employees. But again, no such facts are present here. Moreover, although *D. R Horton* failed to acknowledge it, *J.I. Case* specifically approved individual agreements that do not have the proscribed effect on collective bargaining. In language that was inexplicably omitted from the *D. R. Horton* opinion, the Court stated that:

> We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the em-

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[75] For this same reason, *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942) (individual contracts with provision for arbitration of disputes tendered to employees shortly after union's request for recognition, at same time that wage increases and other benefits granted, unlawful, where they had the purpose of persuading employees that it was unnecessary to join or remain a member of the union in order to obtain the benefits that normally result from collective bargaining), is inapplicable here.

> ployer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement.[76]

Because the individual arbitration agreements at issue here have no effect on the Respondent's collective bargaining obligations, *J.I. Case* supports my view that they were lawful.

The balance of Section 7 rights against legitimate employer interests is quite different, however, for employer conduct that goes beyond the assertion in court of an individual arbitration agreement and involves job-related reprisals. The impact on Section 7 rights of discharge or other job-related adverse action is significant. A principal aim of the Act is to protect employees against such retaliation, and its prohibition creates no risk of conflict with the FAA or any other Federal law.[77] Accordingly, it should come as no surprise that *all* of the employee litigation cases cited in *D. R. Horton* involve just this sort of retaliation.[78] Protecting

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[76] *J.I Case*, 321 U.S. at 339.

[77] *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941) ("a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act"); see also GC Memo 10-06, above.

[78] *Brad Snodgrass, Inc.*, 338 NLRB 917, 922-927 (2003) (employees discharged because their union filed contractual grievances on their behalf); *Le Madri Restaurant*, 331 NLRB at 269; *Miami Systems Corp.*, 320 NLRB 71, 77 (1995) (employer eliminated a shift, and accordingly laid off one employee, "to retaliate against" union members for their pursuit of a grievance), enf. denied in pertenant part and remanded 111 F.3d 1284 (6th Cir. 1997); *United Parcel Services*, 252 NLRB at 1015; *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1032-1035 (1976) (suspending an

employees from job-related retaliation is the mission of this agency. Determining the terms under which litigation or arbitration is to be conducted is not.

Focusing solely on the provisions of the Act and without any consideration of the FAA issues presented, I also agree that the 8(a)(1) balance weighs against prohibitions on the joinder or consolidation of individual claims into a single proceeding. Employees who join together as named plaintiffs to litigate an employment-related claim are plainly engaged in concerted activity for mutual aid or protection. That concerted activity continues throughout the litigation as the employees cooperate in the litigation of their claims. While there is no violation of Section 8(a)(1) if an employer opposes joinder on other grounds, a prohibition on joint litigation imposed as a condition of employment prevents the exercise of this Section 7 right and does not serve any of the legitimate employer interests discussed above. Indeed, it may in fact impose higher litigation costs than would be the case if claims are consolidated.[79]

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employee for writing an informal grievance protesting nurses' job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975); *El Dorado Club*, 220 NLRB 886, 888 (1975) (discipline and discharge of an employee because he participated in another employee's successful arbitration), enfd. 557 F.2d 692 (9th Cir. 1977); *Salt River Valley Water Users Assn.*, 99 NLRB at 849; *Spandsco Oil & Royalty Co.*, 42 NLRB at 942; *Salt River Valley Water Users Assn.*, 99 NLRB at 849.

[79] For the reasons discussed below, however, the FAA nevertheless does not allow the Board to find that an arbitration agreement violates the Act on the grounds that it prohibits the joinder of claims.

III. THE BOARD MUST ACCOMMODATE THE ACT TO THE FAA AND OTHER STATUTES, INSTEAD OF SUBORDINATING ALL OF THEM TO THE ACT

As shown, the maintenance of individual arbitration agreements and their enforcement in court or arbitration does not violate the Act merely because they include class or collective action waivers. Even if this were doubtful, and it is not, that would not end the inquiry. The invalidation of such agreements raises at least a possible conflict with the FAA, which, as noted above, generally requires that such agreements be enforced "according to their terms."[80] When faced with a potential conflict between the Act and another federal statute, the Board must endeavor to accommodate the two.[81] And the Supreme Court has already determined how conflicts between the Act and the FAA must be resolved: the arbitration agreement prevails unless invalidated by "such grounds as exist at law or equity for the revocation of any contract" (the FAA savings clause) or the FAA is "overridden by a contrary congressional command."[82] Neither ground applies here. Accordingly, both class and collective action waivers, and waivers on the joinder of claims, may not be found to violate the Act when they are included in an arbitration agreement to which the FAA applies.

The Supreme Court has made clear that the FAA savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses,

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[80] *CompuCredit*, 132 S. Ct. at 669.

[81] *Southern Steamship Co. v. NLRB*, 316 U.S. at 31.

[82] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[83] But the Court has also made clear that the FAA savings clause does not permit defenses that, while neutral on their face, "would have a disproportionate impact on arbitration agreements."[84] *And the Court has made equally clear that any provision requiring classwide litigation is just such a defense.*

Requiring that classwide procedures always be available has an impermissible disproportionate impact on arbitration agreements, because in practice its prohibition falls more heavily on such agreements. To the extent that this requirement means that employees must always have access to class or collective actions in court, this disfavors arbitration because "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an in-

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[83] *Concepcion*, 131 S. Ct. at 1746.

[84] *Concepcion*, 131 S. Ct. at 1747. As the Court explained (internal citations and quotations omitted):

> Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. As we have said, a federal statute's saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.

dividual basis."[85] Nor does the alternative of classwide arbitration save the rule: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[86] Either way, "employers would be discouraged from using individual arbitration."[87] Accordingly, "the FAA requires not just compelling arbitration, but compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis."[88]

The Act likewise does not evidence a "contrary congressional command" with the textual clarity required to override the FAA. In *CompuCredit*, the Court found no such command in the federal Credit Repair Organization Act (CROA) despite language in that law requiring consumer disclosures reading "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act" and a nonwaiver provision stating "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." As the Court observed:

> When [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA. See,

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[85] Id. at 1750; see also *Southland Corp. v. Keating*, 465 U.S. at 7 ("Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.").

[86] Id. at 1748.

[87] *D. R. Horton v. NLRB*, 737 F.3d at 359.

[88] *Jasso v. Money Mart Express*, 879 F. Supp. 2d at 1048-1049.

> e.g., 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy"); cf. 12 U.S.C. § 5518(b) (2006 ed., Supp. IV) (granting authority to the newly created Consumer Financial Protection Bureau to regulate predispute arbitration agreements in contracts for consumer financial products or services). That Congress would have sought to achieve the same result in the CROA through combination of the nonwaiver provision with the "right to sue" phrase in the disclosure provision, and the references to "action" and "court" in the description of damages recoverable, is unlikely.[89]

Likewise, the Court later found no "contrary congressional command" in the federal antitrust laws:

> The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. The parties here agreed to arbitrate pursuant to that "usual rule," and

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[89] *CompuCredit*, 132 S. Ct at 672-673.

> it would be remarkable for a court to erase that expectation.[90]

And the explicit provision for opt-in collective actions in the FLSA does not establish a contrary congressional command either.[91] Simply put, under the binding Supreme Court precedent on how to divine and interpret potential conflicts with the FAA, we should look to the text of our statute, see whether it expressly restrains or bans arbitration, and defer to the FAA if, as here, it does not.

Applying these principles, as we must, leads inescapably to the conclusion that if the CROA, the FLSA, and the antitrust laws do not express a "contrary congressional command" with the requisite clarity, then neither does the Act. Like the antitrust laws, the Act "make[s] no mention of class actions" and was enacted long before the advent of Rule 23.[92] The Act does not address the use of arbitration agreements even to the same degree as was found insufficient in the CROA, much less with the "clarity" of the express prohibitions on predispute arbitration agreements found in the

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[90] *Italian Colors*, 133 S. Ct. at 2309 (internal citations and quotations omitted). *Italian Colors* acknowledged that an arbitration agreement also may be unenforceable if they prevent the effective vindication of a "statutory cause of action in the arbitral forum," but no party contends that the agreements at issue here prevent the Charging Parties from effectively vindicating their own FLSA claims. Id. at 2310-2311.

[91] *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d at 1326; *Sutherland v. Ernst & Young LLP*, 726 F.3d at 290; *Owen v. Bristol Care, Inc.*, 702 F.3d at 1050; *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d at 294; *Adkins v. Labor Ready, Inc.*, 303 F.3d at 496.

[92] *Italian Colors*, 133 S. Ct at 2309; see also fn. 35, above.

federal statutes cited with approval in *CompuCredit*.[93] *The Act does not address the enforceability of such agreements at all.* Consistent with *Italian Colors* and *CompuCredit*, any conflict between the Act and the FAA with respect to class or collective action waivers or waivers of the joinder of claims therefore must be resolved in favor of arbitration.[94]

Writing before *Italian Colors* and *CompuCredit* were decided, the *D. R. Horton* Board viewed the interplay of the FAA and the Act very differently. According to *D. R. Horton*, there is no cognizable conflict between the Act and the FAA because: (1) the prohibition on the waiver of the Section 7 right to class or collective litigation discerned in *D. R. Horton* would apply equally to a contract that did not provide for arbitration; (2) arbitration agreements are not enforceable if they "require a party to forgo the substantive rights afforded by the statute,"[95] and individual arbitration agreements waive substantive rights under the

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[93] *D. R. Horton v. NLRB*, 737 F.3d at 360 (NLRA does not contain contrary Congressional command overriding the FAA); *Jasso v. Money Mart Express*, 879 F. Supp. 2d at 1048-1049 (same); see also *Walton v. Rose Mobile Homes*, above (recognizing that Court has found no contrary Congressional command in every case where arbitration not explicitly excluded).

[94] The Act, of course, does contain the requisite clear Congressional command with respect to any provision, whether contained in an arbitration agreement or otherwise, that purports to restrict access to the Board with respect to the filing or litigation of unfair labor practice charges. See, e.g., 29 U.S.C. § 160 (The Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . .").

[95] *Gilmer v. Interstate/Johnson-Lane Corp.*, 500 U.S. 20, 26 (1991).

Act; and (3) the FAA must yield to the Act because individual arbitration agreements that include class action waivers are contrary to the Norris-LaGuardia Act (NLGA), 29 U.S.C. § 101, *et seq.*[96] With the additional benefit of the Supreme Court's recent guidance, it is even clearer that all of these contentions are meritless.

First, *D. R. Horton* erred insofar as it narrowly construed the FAA to allow rules that on their face apply equally to contracts that do not involve arbitration. As noted above, that view of the FAA was rejected by the Supreme Court post-*D. R. Horton* and therefore must be abandoned.[97]

Second, the Supreme Court has never held that an agreement to arbitrate a statutory claim is invalid to the extent that it divests a party of substantive rights under *any conceivable statute*; instead, the requirement is only that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by *the* statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[98] The substantive rights referred to are thus those arising *under the statute that gave rise to the claim.* This

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[96] *D. R. Horton*, slip op. at 9-12.

[97] See, e.g., *Long v. BDP International*, 919 F. Supp. 2d at 852 fn. 11 (*D. R. Horton* contradicts the Supreme Court's holding in *CompuCredit*); *Carey v. 24 Hour Fitness*, 2012 WL 4754726 (S.D. Tex. 2012) (same); *Iskanian v. CLS Transport of Los Angeles*, 142 Cal. Rptr. 2d. at 382 (same); *Zabelny v. Cashcall, Inc.*, 2014 WL 67638, 21 Wage & Hour Cas.2d (BNA) 1556 (D. Nev. Jan 08, 2014) (same).

[98] *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added).

exception to the FAA therefore cannot be invoked to invalidate an individual arbitration agreement's application to claims arising under other statutes on the theory that the arbitration agreement abrogates rights under the Act.

Third, and most importantly, the courts' repeated recognition that the type of litigation rights that *D. R. Horton* discusses are inherently *procedural* ones under the underlying statutes means that the Board is simply off-base by declaring them "substantive" under an NLRA label. This error results in the tautology that such rights are Section 7 rights because they are "substantive," and thus Section 7 protects them as substantive rights. The Board cannot make something that walks like, looks like, and sounds like a procedural duck into a substantive swan, merely by declaring that it falls into the ambit of Section 7. See above, at pp. 36-38. Indeed, this point is no more dramatically underscored than by the results of the majority's reasoning in regard to Rule 23 class actions. Here, the majority's holding effectively causes Rule 23 to supersede the FAA by now allowing Rule 23 pleadings to override class action waivers in arbitration agreements. *But this is something neither Congress nor the courts themselves could do, even if they wrote an explicit amendment to Rule 23 mandating that result.* Because Rule 23 was passed under the Rules Enabling Act, 28 U.S.C. §§ 2071, et seq., it "shall not abridge, enlarge or modify any substantive right." Id., § 2072(b). Overriding the FAA certainly is an abridgement of a party's rights—both under the FAA and under that party's contract—to have its arbitration agreement enforced. Simply put, Section 7 cannot enlarge Rule 23 beyond the ability of Rule 23's own authorizing statute. See

Wal-Mart Stores v. Dukes, 131 S. Ct. at 2561 (holding that the Rules Enabling Act precludes Rule 23 from abridging, enlarging or modifying any substantive right); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-488 (2d Cir. 2013) ("Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action claim under Title VII, even though a class action would be the only way a private litigant could conceivably bring such a claim).

IV. NONE OF THE MAJORITY'S ASSERTED RATIONALES WORK TO SALVAGE D. R. HORTON

A. A Class Action Waiver is not the "Waiver of Statutory Remedies or Rights" That Mitsubishi Motors Would Prohibit

Pursuing their novel approach, the majority here attempts to salvage *D. R. Horton* in two ways. First, it argues that the Supreme Court in *Italian Colors* has instructed that a valid arbitration agreement under the FAA may not require a party to prospectively waive its "right to pursue statutory remedies." 133 S. Ct. at 2310 (citing *Mitsubishi Motors*, 473 U.S. at 637, fn. 19). Thus, the majority concludes that the FAA cannot possibly allow an agreement with a provision precluding class/collective action procedures, because that would be a waiver of Section 7 rights and remedies. But, as demonstrated earlier (see pp. 37-38, supra), the Supreme Court forbade interpreting the Federal Arbitration Act to allow "a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *Concepcion*, 131 S. Ct. at 1748. The majority attempts to cabin *Italian Colors*' holding here into a Supremacy Clause pigeon-

hole, because the principle originally arose in *Concepcion*, a case that pitted the FAA against state law. But the rule of "no self destruction" is patently a general principle of FAA interpretation that by definition applies also to Federal statutes, too, not just where the FAA conflicts with state law doctrines, like in *Concepcion*. How do we know? *Italian Colors* applied this principle to solve an asserted conflict between the FAA and *Federal antitrust law*, namely section 1 of the Sherman Act and section 4 of the Clayton Act. Therefore, this interpretive principle also applies to the FAA's interplay with Section 7's substance, and *Mitsubishi Motors* accordingly cannot become a Trojan Horse allowing Section 7's purported substance to destroy the FAA. The majority discounts this holding of *Italian Colors*, even though it clearly dealt with a federal-statute-versus-FAA conflict question, by asserting that Section 7 has unique, important goals and is "sui generis."[99] By that reasoning, every Federal statute is sui generis, and the Supreme Court's FAA conflict precedents mean nothing, unless and until the Court actually determines a FAA case involving that particular statute. That is not how we should treat binding case law handed down from the nation's highest court, especially on a statutory construction question outside of our expertise.

The majority also cannot refute that the pertinent "statutory remedies" held unwaivable under *Mitsubishi* are the *remedies arising from the baseline employment statute that underlies the litigation, and not process rights concerning how that claim is adjudi-*

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[99] I do not understand why, in the abstract, Federal antitrust law is somehow less unique or important than the Act.

cated, i.e., whether the claim should be litigated on an individual or class action basis. The majority states that they "cannot agree" with this reading of the *Mitsubishi* exception, but instead advances an interpretation of this exception that no court has embraced and that contradicts clear guidance from the Supreme Court itself. In *Mitsubishi*, the Court found that the plaintiff could effectively vindicate its statutory antitrust cause of action in the arbitral forum after assuring itself that the arbitrator would apply American law in deciding that claim and, therefore, that the arbitration agreement did not operate as a prospective waiver of the plaintiff's antitrust claims. In the Court's own words, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." In *Gilmer* and *14 Penn Plaza*, the Court looked to statutory rights under the ADEA in determining whether an agreement to arbitrate such claims was valid, finding in *14 Penn Plaza* that an agreement to arbitrate ADEA claims did not prevent their effective vindication because it did not "waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance." And in *AT&T Mobility*, the Court likewise looked to the scope of substantive antitrust law in determining whether the plaintiff could effectively vindicate its antitrust claim in arbitration. These cases amply demonstrated that the *correct statutory remedy to examine is the one supplying the cause of action*, not Section 7. Because the agreements at issue in this case allow employees to vindicate their "statutory cause of action," i.e., their FLSA claims, the *Mitsubishi* exception does not apply.

The majority raises the specter that if the FAA is allowed to prevail, then employers could require employees to waive other Section 7 rights such as the right to strike by including a strike waiver provision in an arbitration agreement. My colleagues tilt at a straw man of their own making here, because their analogy does not work. Employees can strike, or picket, or engage in a consumer boycott in support of a dispute with their employer *while at the same time* submitting the dispute to arbitration.[100] One does not preclude the other. But a party logically cannot at the same time both arbitrate a dispute and also have it decided by a court, or have the dispute resolved by both individual and also class arbitration. In other words, a waiver of the right to litigate in court, or of class arbitration, is thus enforceable under the FAA as part and parcel of the basic agreement to arbitrate, while a waiver of the right to strike is not.

Throughout its opinion, the majority claims that the Act's goal of labor peace makes it different than other statutes for purposes of FAA conflict resolution. But this argument lacks merit for two reasons. The first is that the Supreme Court does not look to the *objective* of the statute in counterpoise with the FAA, *but its express text*, as explained above. As noted, there is no express textual ban of either class arbitration waivers or individual arbitration agreements in the Act. Second, labor peace will absolutely not be threatened by enforcing arbitration agreements with employees. Con-

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[100] The Supreme Court has implied a no strike pledge from a collectively bargained agreement to submit a dispute to arbitration, but that principle has no application here. See generally *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962).

gress has consciously determined otherwise in the FAA, as it already made the judgment that the FAA should apply to most employment contracts—indeed, the only classes of workers to be exempted from the FAA were transportation workers, as seen in Section 1 of the FAA. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); 9 U.S.C. § 1. And, the Court has made the judgment that arbitration is a perfectly suitable method of adjusting both individual and collective employee issues in *Penn Plaza*, above, and the *Steelworkers* Trilogy.[101] In the final analysis, the majority's "labor peace" argument actually boils down to this: it is class actions that are now somehow necessary to ensuring labor peace, even though they were unheard of in 1935, when the Act was passed, and even though the Court has never condemned individual-specific arbitration agreements, like the Agreement here, that do not seek to supplant a union's role as a bargaining and grievance-resolution representative. But class actions are no more essential to securing labor peace than any other procedural litigation rule, which is to say, not at all.

B. Section 10(a) is Neither an Independent nor Supplemental Basis to Locate a Congressional Command Vitiating a Class Waiver Arbitration Provision

The second way the majority attempts to avoid *Italian Colors* is to take refuge in Section 10(a) of the Act, arguing that it prohibits all class action waiver arbitration provisions, because they "affect the Board's enforcement of Section 7" by restricting protected concerted activity in a manner that would not be per-

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[101] See fn. 112, infra.

missible if not embodied in an arbitration agreement. Section 10(a) states in relevant part that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." The majority claims that this language, combined with the Act's Section 7 protection of "concerted activity for mutual aid or assistance," is enough of an express Congressional command to vitiate an otherwise enforceable class action waiver.

This argument fails for several reasons. Principally, this argument fails obviously because the words or phrases "class action," "class action waiver," or "arbitration agreement" nowhere appear or are combined with "prohibit, "limit," "void," or any kind of express restrictions one would find necessary to override the FAA, after reviewing the guidance of *Italian Colors*. Second, it is obvious that the relatively generic term "concerted activity" cannot function as an express obliteration of class action waivers. *Italian Colors* itself held that even a statutory provision that *expressly provides for "collective actions" within its text* is not enough to act as an express Congressional command prohibiting a class action waiver:

> A pair of our cases brings home the point. In Gilmer, supra, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions.

133 S. Ct. at 2311. Thus, there is nothing in the text of the Act, unfortunately for the majority, that

would come close to prohibiting arbitration agreements under the reasoning of *Italian Colors*, a case which binds us on principles of statutory construction wherever conflict between the FAA and another statute may exist. Nor can the Board simply look back to its earlier decisions interpreting Section 7 in the context of group litigation to "bootstrap" its way into creating an "express Congressional command" to set aside arbitration agreements. Simply put, we are not Congress, and our case adjudications cannot create that command.

Whether the majority chooses to rely on Section 7, Section 10, or some combination thereof, the ultimate point is that nothing in the Act specifically prohibits class action waivers or arbitration agreements in general. The current Supreme Court jurisprudence on FAA conflict construction—which binds the Board—looks to *the actual text of the actual statute* and *not to the Board's interpretation* of prior Board or court decisions about the statute. It especially does not look to argumentative gloss by the Board about what the statute means, which comes solely from an interpretation of prior cases *that had nothing to do with class action waivers*. That is the point. We are not Congress. We cannot, by the argumentative fulcrum of interpreting a selective succession of earlier court or Board decisions, now declare that Section 7 (or 10) bans class action waivers. And, whether before or after *D. R. Horton*, no Supreme Court decision has ever held that the Act prohibits class action waivers in particular or renders individual-specific arbitration agreements totally void as a general proposition. The majority cannot now use interpretations of prior cases as a bootstrap to then argue that a complete prohibition exists in the Act, when that prohibition is not in the Act's

text. Relying on extrapolations from prior cases is not relying on statutory text.

Third, my colleagues seriously err in reading Section 10(a) as a substantive right of any cognizable sort. Section 10(a) establishes the superior authority of the Board, over other tribunals, to prevent unfair labor practices. *Hammontree v. NLRB*, 925 F.2d 1486, 1491-1492 (D.C. Cir. 1991). It does not prohibit actions by employees, employers, or unions that may then in turn affect whether an unfair labor practice has been committed. If it did, much of the Act's jurisprudence would be turned on its head. For example, no-strike clauses would obviously be unlawful, because employers and unions could not "affect the Board's enforcement of section 7" by agreeing to a no-strike clause. But these clauses are lawful. See, e.g., *Fineberg Packing Co.*, 349 NLRB 294 (2007), affd. 546 F.3d 719 (6th Cir. 2008) (discharge of employees who violated contractual no-strike clause). Similarly, employers could not adopt rules denying off-duty employees access to the employer's premises, because such rules would undoubtedly "affect the Board's enforcement of Section 7." But they can adopt such rules. See *Tri-County Medical Center*, 222 NLRB 1089 (1976) (off-duty access rule). Most of the Board's prior jurisprudence shows that this novel interpretation of Section 10 has never been accepted.

C. The Majority's Arguments do not Make the Norris-LaGuardia Act Relevant Here

The majority, just as *D. R. Horton* did, relies on the Norris-LaGuardia Act, but nothing there requires a different result. That statute does state that it is the public policy of the United States that employees "shall

be free from the interference, restraint, or coercion of employers of labor, or their agents, in . . . self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[102] It further declares unenforceable in any federal court "any undertaking or promise . . . in conflict with the public policy . . . ." described above, including promises not to join or remain a member of a union, or to withdraw from an employment relation in the event an employee later joins a union—commonly termed "yellow dog contacts."[103] And it divests the federal courts of power to enjoin any person from "[b]y all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State."[104] Combining these various provisions, *D. R Horton* concluded that the NLGA "protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer."[105] I respectfully disagree.

I am not aware of a single case holding that an individual-specific arbitration agreement violates the NLGA, and no such case is cited in the majority opinion or *D. R. Horton* itself. In light of the Supreme

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[102] 29 U.S.C. § 102.

[103] 29 U.S.C. § 103. Agreements not to join a union "were so obnoxious to workers that they gave these required agreements the name of 'yellow dog contracts.'" *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 534 (1949).

[104] 29 U.S.C. § 104.

[105] *D. R. Horton*, slip op. at 6.

Court's repeated and emphatic approval of individual arbitration agreements, I reject any implication by the majority or in *D. R. Horton* that they may be condemned as "yellow dog" contracts.[106] To the contrary, decades of precedent plainly hold that the NLGA "has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made."[107] Thus, "[a]n agreement to arbitrate is

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[106] Id. at 5-6. As shown above, an individual arbitration agreement containing a class or collective litigation waiver does not interfere with the right to engage in concerted activity for the purpose of mutual aid or protection, properly understood. Part of the reason why this is so is that, as previously stated, a class or collective litigation waiver, alone, does not interfere with any employee's ability to assist other employees in pursuing Federal court litigation against their employer by, for example, sharing information or litigation expenses. Accordingly, there is simply no merit to *D. R. Horton's* view that such provisions interfere with concerted activity for mutual protection or prevent any party from aiding an individual involved in litigation related to a labor dispute.

[107] *Local 205 v. General Electric Co.*, 233 F.2d 85, 90 (1st Cir. 1956) (quoting *Textile Workers Local 1029 v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953)), affd. 553 U.S. 547 (1957).

As the Court explained in *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 250 (1970), the NLGA "was responsive to a situation totally different from that which exists today," where federal courts "were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups." Thus, the real focus of the NLGA was "to remedy the growing tendency of federal courts to enjoin strikes." *Jacksonville Bulk Terminals, Inc. v. Longshoremen Assn.*. 457 U.S. 702, 708 (1982). The "labor disputes" at issue in a case like here do not involve strike activity and thus, do not implicate the true focus of

not one of those contracts to which the Norris LaGuardia Act applies."[108] Consistent with this precedent, the Fifth Circuit summarily dismissed the Board's NLGA reasoning as "unpersuasive" in *D. R. Horton v. NLRB*.[109] I respectfully submit that the Board should defer to this established judicial precedent and abandon its unsupported interpretation of the NLGA. Here, while the majority terms the Fifth Circuit's treatment of the NLGA "troubling," the only authority they can muster for their contrary view is a law review article whose authors openly disparage individual-specific arbitration agreements and the Supreme Court's decisions upholding them.[110] Rather than rely on such views, the Board should instead defer to the interpretation of the NLGA adopted by the courts, as the tribunals charged with its enforcement. There is no valid justification for the majority's refusal to do so.

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the NLGA. Moreover, in *Boys Markets*, the Court held that the NLGA should not be read to deprive federal courts of jurisdiction to enjoin a strike in violation of a no-strike pledge over an arbitrable dispute, consistent with the Congressional policy in favor of arbitration reflected in later enactments. To the extent necessary, a similar accommodation is called for here.

[108] *Morvant v. P.F. Chang's China Bistro*, 870 F. Supp. 2d at 844; see also *Applebaum v. AutoNation Inc.*, 2014 WL 1396585 (C.D. Cal. 2014) (neither the NLRA nor the NLGA renders class action waivers in arbitration agreements unenforceable).

[109] 737 F.3d at 362 fn. 10.

[110] Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Activity Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013, 1065-1066 (2013) (motivation for individual arbitration agreements "—to deter claims—is sufficiently apparent elsewhere that those who do not see it either have not been paying attention or are looking the other way . . . whether the majority's thinking in [*Concepcion*] was right or wrong . . . .").

The last, insurmountable problem for the majority is a comparison of the texts of the two statutes themselves. As noted above, the NLGA prohibits a court from enjoining any person who is "*[b]y all lawful means* aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit . . . ." 29 U.S.C. § 104 (italics added). First, employees who are merely identified in lawyer-drafted pleadings as "putative class members" rather than having actively joined the lawsuit at hand do not readily fit into the categories of "participating" or "interested in" that lawsuit. Even if they did, there is a more fundamental problem with the majority's strained NLGA coverage argument—the class action plaintiff who ignores an arbitration agreement is not covered by the NLGA, by definition.

I start with the language of the FAA here. Boiled down to its core, the FAA provides that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . .shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. It is elementary that a person who simply ignores the terms of an arbitration agreement to file a lawsuit instead acts in contravention of that controlling principle of Federal contract law. Simply stated, under the text of the FAA, ignoring a validly formed, FAA-protected arbitration agreement in favor of going to court constitutes a breach of the agreement. Allowing this breach to stand, as the majority's analysis would, undermines the legal command of the FAA. Here, the relevant section of the NLGA protects only those who use "lawful means" to assist others who are participating in a labor dispute.

Intentionally breaching one's obligations under an arbitration agreement, as defined by the FAA, cannot rationally be deemed a lawful means under the NLGA.[111]

The majority further reasons here that the NLGA must displace the FAA because the NLGA renders conflicting laws void. But, as discussed above, there is no conflict because the NLGA only protects "lawful means." Moreover, the majority's argument is overbroad even if there were some tension between the two statutes. Under the majority's logic, any statute would simply be repealed where it would otherwise prohibit conduct that happened to assist others in a labor dispute. For example, if a person violated an existing Federal law to try to assist an organizing campaign, the NLGA would not supplant the statute that made the act illegal. The NLGA does not make an unlawful act suddenly lawful, simply because that act assists someone else in a labor dispute.[112]

V. D. R. Horton is Unwise Policy and Should be Rejected on That Basis Alone

D. R. Horton must be rejected because it is contrary to the Act and cannot be reconciled with the overriding Federal policy favoring arbitration embodied in the FAA. But it is also unsupportable on policy

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[111] It is no answer to say that the FAA's savings clause imports the NLGA as a "ground[] as exist[s] at law . . . for the revocation of any contract" in order to short-circuit the FAA's coverage. The Supreme Court held in *Italian Colors* that the savings clause cannot be interpreted to undermine FAA coverage this way in the context of Federal statutes, just as it had held in *Concepcion* with state unconscionability rules. See above at pp. 36-37, 53-55.

[112] See *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942).

grounds. It attempts to restrict the use of arbitration despite decades of precedent clearly favoring arbitration as a means of peacefully resolving labor disputes. And it takes that step for the purpose of determining how litigation will be conducted in court or before an arbitrator, an area uniquely within the competence of those tribunals in which this agency has no expertise or role to play.

The Supreme Court has repeatedly held that Federal courts must defer to the arbitration process, most notably in the *Steelworkers* Trilogy.[113] The Board likewise has recognized that it must "give hospitable acceptance to the arbitral process" in order to fully effectuate the national labor policy.[114] And the Supreme Court has extended the same extraordinary deference to arbitration agreements that do not involve a bargaining representative. Sweeping aside objections to such agreements as contracts of adhesion, unconscionable, exculpatory agreements and the like, the Court has repeatedly held that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom [the parties]

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[113] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (arbitrator's decision must be enforced by courts if it draws its essence from the contract); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (all doubts resolved in favor of arbitration); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (dispute arbitrable if claim is governed by contract on its face).

[114] *International Harvester Co.*, 138 NLRB 923, 926-927 (1962), enfd. sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), cert. denied 377 U.S. 1003 (1964).

choose to arbitrate their disputes, and the rules under which that arbitration will be conducted."[115]

D. R. Horton's view of individual arbitration agreements stands in marked contrast to this established body of law. As noted, it invalidates innumerable individual arbitration agreements and, in tandem with today's opinion, declares their enforcement in court to be an unfair labor practice. And it attempts to undermine the entire framework for arbitration agreements that Congress established in the FAA, as elucidated by the Supreme Court in an unbroken series of cases over the past 35 years. As noted, the Court has held that Congress intended arbitration to be available to resolve claims under a variety of Federal laws.[116] The Court has also determined, after thorough consideration, that Congress intended the FAA to apply to State law claims filed in state court, and to preempt state laws limiting access to arbitration.[117] *D. R. Hor-*

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[115] *Italian Colors*, 133 S. Ct. at 2309 (internal citations and quotations omitted); see also *Concepcion*, 131 S. Ct. at 1740 (individual arbitration not exculpatory or unconscionable); *Gilmer*, 500 U.S. at 20 (rejecting claims that arbitration unfair, or that arbitration agreements should not be enforced in employment setting due to asserted unequal bargaining power).

[116] *CompuCredit*, 132 S. Ct at 672 (CROA); *Gilmer*, 500 U.S. at 20 (ADEA); *Italian Colors*, 133 S. Ct. at 2309 (antitrust laws).

[117] *Southland*, 465 U.S. at 1 (antiwaiver provision of State franchise law preempted insofar as it barred enforcement of arbitration agreement); *Concepcion*, 131 S. Ct. at 1740 (FAA preempts state rule holding class arbitration waivers unenforceable as applied to arbitration agreements); *Perry v. Thomas*, 482 U.S. 483 (1987) (State law exempting wage collection laws from arbitration agreements preempted by FAA)); *Preston v. Ferrer*, 552 U.S. 346 (2008) (FAA preempts State law giving State administrative agency ex-

ton plainly undermines this entire regime—a regime that the Supreme Court consciously and painstakingly worked out in a stream of cases over decades—in the context of federal employment litigation. Under the guise of protecting and promoting the Act, *D. R. Horton* also effectively undermines the similarly long-lived body of Supreme Court's jurisprudence on state anti-arbitration rules, by indirectly resurrecting the state law prejudice against arbitration that the FAA was enacted to prevent.

D. R. Horton's protestation that it bears "no hostility" to individual arbitration despite all this is difficult to reconcile with its suggestion that such agreements are comparable to "yellow dog" contracts.[118] And what end is served by this abrupt departure from decades of "hospitable acceptance?" Class arbitration has been condemned by the Supreme Court as inconsistent with the arbitral process, as noted above. Accordingly, *D. R. Horton* is really about securing access to "a judicial forum for class and collective claims."[119] Even setting aside the many insurmountable obstacles to the application of *D. R. Horton* discussed above, the fact remains that access to those procedures is controlled by the courts and by the detailed provisions of other federal statutes and the Federal Rules of Civil Procedure. See sections III, and IV, supra.

Given those detailed requirements, and the difficulty many plaintiffs experience in satisfying the re-

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clusive jurisdiction over action for breach of contract with talent agent).

[118] *D. R. Horton*, slip op. at 5, 13.

[119] Id. at 12.

quirements of Rule 23 in particular,[120] in the end *D. R. Horton* boils down to an express insistence that employees must have what is in practice a very limited "*opportunity* to pursue . . . such claims of a class or collective nature as may be available to them under Federal, State, or local law."[121] But the Supreme Court has already rejected that very proposition—the proposition "that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration."[122] The conflict between *D. R. Horton* and binding Supreme Court precedent could not be plainer.

There is but one plausible outcome to this conflict. While it rages, however, the cost to this agency will be immense. *D. R. Horton* commits the Board and the General Counsel to engage in an ever-expanding "roving commission" by either directly or de facto intervening in each of the thousands of workplaces where individual arbitration agreements are in place.[123] Today's decision escalates the conflict by requiring the General Counsel, upon the filing of a charge, to intervene in any of the thousands of employment litigation cases where one of those agreements is invoked. The

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[120] See, e.g., *Stiller v. Costco Wholesale Corp.*, __ F. Supp. 2d __, No. 3:09-cv-2473-GPC-BGS (S.D. Cal. 2014) (decertifying statewide class of 30,000 employees allegedly detained without pay until lockdown procedures completed and rejecting FLSA collective action status for group).

[121] *D. R. Horton*, slip op. at 10 fn. 24 (emphasis added).

[122] *Italian Colors*, 133 S. Ct at 2310; see also *AT&T Mobility*, 131 S. Ct. at 1748.

[123] See generally Winston Churchill, *A Roving Commission: My Early Life* (Charles Scribner's Sons 1930).

Board, too, will be committed to this struggle, with its inventory of at least 37 *D. R. Horton* cases representing more than 10 percent of the unfair labor practice cases pending at the Board level. The resources committed to that struggle will not be available to investigate, prosecute, and adjudicate those unfair labor practices that Congress created this agency to prevent.[124]

My colleagues in the majority embark on this course in good faith, motivated by the goal of enforcing the Act as they understand it. Their good intentions, however, cannot change the fact that both *D. R. Horton* and today's decision are steering the agency on a collision course with the Supreme Court. This might be understandable if these cases involved the core employee-to-employee concerted activity that lies at the heart of the Act. As shown, that is not the case. What is at stake here, instead, is merely an increase in the utilization of class and collective action procedures established by other Federal laws and administered by the Federal courts according to decades of their own precedent—all areas where this agency has no expertise. In these circumstances, the likely outcome is a regrettable but completely predictable, understandable diminution of deference to the Board's orders, as various courts continue to reject *D. R. Horton's* reasoning

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[124] Given the vast amount of Board resources deployed and spent upon this struggle over an area far flung from our expertise, this is the Agency's equivalent of ancient Athens' doomed Sicilian Expedition during the Peloponnesian War or its contemporary-but-apocryphal analogue, the "land war in Asia." See Thucydides, *The History of the Peloponnesian War* (translated by Richard Crawley, Project Gutenberg ed., 2009); "The Princess Bride" (1987), quoted at http://www.imdb.com/title/tt0093779/quotes (last visited August 13, 2014).

and this agency's attempt to interfere with their management of their own cases. And, unfortunately, in the interim, reviewing courts will be less and less likely to defer to the Board's construction of Section 7 in other contexts after dealing with *D. R Horton's* unjustified refusal to apply the FAA as the courts have directed. Finally, and most importantly, this unfortunate conflict will almost certainly end with the inevitable reaffirmation by the Supreme Court that the Act, too, must yield to the federal policy of enforcing arbitration agreements according to their terms.[125] The prospect of victory is too slight, and the possible rewards are too limited to justify *D. R. Horton's* extraordinary cost in diverted resources and lost judicial deference, in my view.

Conclusion

The Act provides employees with strong and important protections when they discuss terms and conditions of employment, decide together on a plan of action to seek improvements in those conditions, and concertedly present their grievances to their employer, an arbitrator, or a court. The Board, alone, protects employees against job-related reprisals when they act concertedly in these respects, and thereby bring the strength of the group to bear on the dispute. These are important rights, and I am committed to their vigorous enforcement. While the Act protects employees when they walk together into the door of the court-

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[125] As an administrative agency, we are duty-bound to faithfully apply extant Supreme Court precedent. The Supreme Court, at its discretion, may change that precedent at any time, but until it does, extant precedent is what it is. Here, the Board has chosen not to petition for certiorari in the *D. R. Horton* case.

house or the arbitration hearing, under the Federal Arbitration Act, what happens there is the business of the court or the arbitrator and may legitimately be governed by individual arbitration agreements like those at issue in this case. Today's decision, like *D. R. Horton* before it, fails to respect that principle. Indeed, the fundamental premise of the majority opinion is that any conflict between the Act and the FAA should be resolved in favor of the Act, which they term "sui generis," and that they are entitled to keep insisting on this view until the Supreme Court itself directly orders them to stop. As to the former rationale, the Supreme Court has consistently resolved conflicts between the Act and other Federal laws in favor of the other statute, even while it has consistently resolved purported "conflicts" with the FAA, based on generalized language, in favor of the FAA.[126] Taking this all in, no reason exists to believe that the Act's generalized provisions will prevail over the FAA, especially given that statute's vigorous enforcement in the unbroken string of recent Supreme Court opinions noted above.

As to the majority's latter rationale of nonacquiescence, it is certainly true that the Board is not required to acquiesce in adverse decisions of lower courts. Tellingly, however, both of the cases cited by the majority for this proposition involved only issues of

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[126] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (bankruptcy law—effectively overruled in part by 11 U.S.C. § 1113); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2000) (immigration law); *Southern Steamship Co. v. NLRB*, 316 U.S. at 31 (maritime antimutiny statute).

the proper interpretation of the Act.[127] The rationale for nonacquiescence—the Board's statutory role in the interpretation of the Act and the fact that the only court authorized to interpret the Act for the entire country is the Supreme Court—has no application whatsoever to the proper interpretation of the Federal Arbitration Act, the Federal Rules of Civil Procedure, the Fair Labor Standards Act, the Norris-LaGuardia Act, and the Rules Enabling Act.[128] Interpretation of those laws is the province of the courts, and with the courts nearly universally rejecting the *D. R. Horton* theory, the Board should defer to their rulings.

Therefore, I must dissent.

Dated, Washington, D.C. Oct. 28, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

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[127] *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005) (waiver of duty to bargain); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-1067 (7th Cir. 1988) (duty to provide information).

[128] Even on its own terms the Board's nonacquiescence policy has its limits. Indeed, the court in *Nielsen*, a case on which the majority expressly relies, held that the Board there had gone beyond "refusing to knuckle under to the first court of appeals (or the second, or even the twelfth) to rule adversely to the Board" and instead was guilty of "dealing with judicial precedent in a disingenuous, evasive, and in short dishonest manner." Yet my colleagues cite the case as support for their treatment of the Supreme Court's FAA jurisprudence all the same.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Binding Arbitration Agreement and Waiver of Jury Trial (Agreement and Waiv-

er) in all of its forms, or revise it in all of its forms to make clear that the Agreement and Waiver does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the Agreement and Waiver in any of its forms that the Agreement and Waiver has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which Sheila Hobson and her three fellow plaintiffs filed their wage claim that we have rescinded or revised the mandatory arbitration agreements upon which we based our motion to dismiss their claim and to compel individual arbitration, and WE WILL inform the court that we no longer oppose the plaintiffs' claim on the basis of those agreements.

WE WILL reimburse Sheila Hobson and her three fellow plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss their wage claim and compel individual arbitration.

MURPHY OIL USA, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-038804 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR CODE OMITTED]

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Binding Arbitration Agreement and Waiver of Jury Trial (Agreement and Waiv-

er) in all of its forms, or revise it in all of its forms to make clear that the Agreement and Waiver does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the Agreement and Waiver in any of its forms that the Agreement and Waiver has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

MURPHY OIL USA, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-038804 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR CODE OMITTED]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER-CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT-CROSS-PETITIONER

May 13, 2016

(Opinion Oct. 26, 2015, 5 Cir., ___, ___, F.3d ___)

Petition for Review of an Order of the
National Labor Relations Board

ON PETITION FOR REHARING EN BANC

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be

polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

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* Judge Dennis did not participate in the consideration of the rehearing en banc.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER-CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT-CROSS-PETITIONER

Feb. 18, 2016

JUDGMENT ENFORCING ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
Board Case No.: 10-CA-03884

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Murphy Oil USA, Inc. to review an Order of the National Labor Relations Board ("the Board") in Board Case No. 10-CA-038804, reported at 361 N.L.R.B. 72, and upon a cross-application for enforcement filed by the Board to enforce said Order. The court heard the arguments of the parties and considered the briefs and agency record. On October 26, 2015, the court handed down its opinion granting in part Murphy Oil's petition, and granting in part the Board's cross-application.

On November 9, the Board filed its proposed judgment with this court. Murphy Oil objected to the Board's proposal and filed its own proposed judgment for our consideration.

The Board has "broad powers in fashioning a remedy . . . to effectuate" the National Labor Relations Act (the "NLRA"). *N.L.R.B. v. Kaiser Agric. Chem., Div. of Kaiser Aluminum & Chem. Corp.*, 473 F.2d 374, 381-82 (5th Cir. 1973). That power, however, is not limitless; "it is contained by the requirement that the remedy shall be appropriate and . . . adapted to the situation which calls for redress." *N.L.R.B. v. Dist. 50, United Mine Workers*, 355 U.S. 453, 458 (1958) (quotation marks omitted). An order should be upheld unless it constitutes an abuse of discretion or exceeds the Board's statutory authority. *Kaiser*, 473 F.2d at 382.

Here, we accept the Board's proposed judgment as appropriate to remedy Murphy Oil's violation with one exception. The proposal would require Murphy Oil to post the notice in Appendix A in all of its more than 1,300 facilities and stores nationwide. Only 148 current employees, however, are affected by the unlawful pre-March 2012 agreement. We have recognized that "[v]iolations at one facility do not necessarily implicate other facilities." *N.L.R.B. v. U.S. Postal Serv.*, 477 F.3d 263, 271 (5th Cir. 2007) (modifying a cease and desist order). Thus, an appropriate mandate is to require Murphy Oil to post the notice at facilities where any of those 148 employees presently are employed. *See Kaiser*, 473 F.2d at 381-82. We so modify the order and in conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that Murphy Oil's petition for review of the Board's decision deeming unlawful the arbitration agreement in effect since March 2012 is GRANTED. It is further ORDERED AND ADJUDGED that the Board's Order concluding the arbitration agreement in effect before March 2012 violated 29 U.S.C. § 158(a)(1) because it could be reasonably construed as prohibiting employees from filing an unfair labor practice charge is ENFORCED. Accordingly, Murphy Oil, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   (a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Rescind or revise the Binding Arbitration Agreement and Waiver of Jury Trial (Agreement and Waiver) applicable to employees hired prior to March 2012 to make it clear that the agreement does not restrict employees' right to file charges with the National Labor Relations Board.

   (b) Notify all employees hired in or prior to March 2012 of the rescinded or revised

agreement, and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Calera, Alabama facility, and any other facility where any of the 148 employees who were subject to the pre-March 2012 arbitration agreement are currently employed, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since July 28, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the Binding Arbitration Agreement and Waiver of Jury Trial (Agreement and Waiver) applicable to employees hired prior to March 2012, to make it clear that the agreement does not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

MURPHY OIL USA, INC.

APPENDIX E

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the

market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

3. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

4. 29 U.S.C. 158(a)(1) provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;